

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MINNESOTA

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4 Fair Isaac Corporation,

5 Plaintiff,

6 vs.

File No. 06-CV-04112

7 Equifax, Inc., et al.,

8 Defendants.

9 -----  
10  
11 THE HONORABLE JANIE S. MAYERON

12 United States Magistrate Judge  
13  
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16 TAPE-RECORDED HEARING

17 TRANSCRIPT OF PROCEEDINGS

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22 Date: 12-5-08

23 Reporter: Lisa M. Thorsgaard  
24  
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APPEARANCES

MR. RONALD J. SCHUTZ, MR. MICHAEL A. COLLYARD, and MR. RANDALL TIETJEN, Attorneys at Law, 800 LaSalle Avenue, Suite 2800, Minneapolis, Minnesota 55402-2015, appeared on behalf of Plaintiff.

MR. JACK E. PACE, MR. CHRISTOPHER J. GLANCY and MR. ROBERT A. MILNE, Attorneys at Law, 1155 Avenue of the Americas, New York, New York 10036, appeared on behalf of Defendant Experian.

MR. CHRISTOPHER R. SULLIVAN, Attorney at Law, Suite 4200, 80 South Eighth Street, Minneapolis, Minnesota 55402, appeared on behalf of Defendant Experian.

MR. CHRISTOPHER R. MORRIS, Attorney at Law, 33 South Sixth Street, Suite 3800, Minneapolis, Minnesota 55402-3707, appeared on behalf of Trans Union.

APPEARANCES (Cont'd)

MR. JAMES K. GARDNER and MR. JOHN A. CULLIS, Attorneys at Law, Suite 2200, Two North LaSalle Street, Chicago, Illinois 60602, appeared on behalf of Trans Union.

MS. JUSTI R. MILLER, Attorney at Law, Suite 3270, 80 South Eighth Street, Minneapolis, Minnesota 55402, appeared on behalf of Defendant VantageScore.

P R O C E E D I N G S

(NO REPORTER WAS PRESENT - the following transcript of proceedings was prepared from a COPY of the original court tape recording)

THE COURT: We have individuals calling in, so before I have everyone introduce themselves, I'm going to wait for that call to come in, see how this technology works.

Hello, Magistrate Judge Mayeron.

MR. GARDNER: Good afternoon, Your Honor. Thank you for facilitating this. It's Jim Gardner.

THE COURT: Mr. Gardner. I can hear myself very well because I'm on a microphone but I'm having a hard time hearing you. So just speak a little more and you may have to turn up the volume or we may have to at this end.

MR. GARDNER: Okay. Is this a little better?

THE COURT: Let's see here. Hang on. Why don't you tell us where you are

1 and what the weather is like.

2 MR. GARDNER: Well, the  
3 weather here is pretty cold but I don't think  
4 it's as cold as it is in Minnesota.

5 THE COURT: All right. And  
6 now we've just improved on your volume. Thank  
7 you.

8 MR. GARDNER: Good. But not  
9 on the substance.

10 THE COURT: Well, we haven't  
11 gotten there yet. All right. Mr. Gardner's  
12 on the phone. And then who else is on the  
13 phone and then I'm going to actually start  
14 over to announce the name of the case and all  
15 of that?

16 MR. MILNE: Your Honor, also  
17 on the phone is Robert Milne with White & Case  
18 in New York on behalf of Experian.

19 THE COURT: All right.  
20 Anybody else on the phone?

21 MR. MILNE: No. That's it.

22 THE COURT: Mr. Gardner,  
23 you're representing?

24 MR. GARDNER: Trans Union.

25 THE COURT: Trans Union. All

1 right. Okay. We're here in the courtroom  
2 this afternoon in -- let me ask if you're  
3 having any trouble hearing me or any of the  
4 parties as they speak or attorneys, you let us  
5 know. Just jump right in.

6 We're here this afternoon on the matter  
7 of Fair Isaac Corporation v. Equifax, et al.,  
8 except Equifax is no longer a party but it  
9 still shows up as the lead party on the  
10 defendants' side of the case. This is Court  
11 File 06-4112.

12 First of all, I'd like to ask the  
13 attorneys to the parties to introduce  
14 themselves. And then I know we have third  
15 parties who are here as well.

16 Let's start with Fair Isaac  
17 Corporation. Who is here this afternoon on  
18 behalf of them?

19 MR. SCHUTZ: Good afternoon,  
20 Your Honor. Ron Schutz with the Robins,  
21 Kaplan firm on behalf of Fair Isaac. Also in  
22 court with me today are my colleagues, Randy  
23 Tietjen and Mike Collyard. Also present,  
24 in-house counsel for Fair Isaac, Renee  
25 Jackson.

1 THE COURT: All right. And  
2 let me tell you, as long as your microphones  
3 are on, meaning they have a green light on at  
4 counsel table, we will be catching you I hope.  
5 And we'll see if those on the phone can hear.  
6 So let's experiment.

7 UNKNOWN SPEAKER: We can hear  
8 perfectly, Your Honor.

9 THE COURT: Well, I expect  
10 that's right because Mr. Schutz came up to the  
11 main podium here. Now we're going to  
12 experiment and see what happens with the  
13 microphones at counsel table.

14 Who is here on behalf of Experian  
15 besides Mr. Milne?

16 MR. PACE: Your Honor, this is  
17 Jack Pace. I will take full advantage of the  
18 microphone today given my voice. From White &  
19 Case on behalf of Experian. Also with me in  
20 the courtroom is Chris Sullivan from the  
21 Lindquist & Vennum firm on behalf of Experian  
22 as well as my partner, Christopher Glancy,  
23 also from White & Case on behalf of Experian.

24 THE COURT: All right. Did  
25 you have any trouble hearing, Mr. Pace?

1 MR. PACE: Not at all.

2 THE COURT: All right. Good.

3 Then on behalf of Trans Union, I know we have  
4 Mr. Gardner on the phone. Anyone else here in  
5 the courtroom? Yes.

6 MR. MORRIS: Yes, Your Honor.  
7 Here live is Chris Morris. And John Cullis  
8 from the Neal, Gerber firm in Chicago is also  
9 here.

10 THE COURT: All right. Okay.  
11 And then anyone here on behalf of  
12 VantageScore?

13 MS. MILLER: Good afternoon,  
14 Your Honor. Justi Miller from Kelly and  
15 Berens.

16 THE COURT: All right. And  
17 then we have one of the motions involves a  
18 third party, the Olson Company. And who is  
19 here on behalf of them? If you say it, I will  
20 speak for you and then when we do the motion,  
21 I'll have you come up.

22 MR. JONES: Your Honor,  
23 Matthew Jones (unintelligible).

24 THE COURT: All right.  
25 Matthew Jones. All right. Let me share with



1        what I understand we need to be addressing  
2        this afternoon. There are actually three  
3        motions but two are basically the flip side of  
4        each other. One is the motion to compel by  
5        defendants against Olson and Company and the  
6        motion for protective order by Olson and  
7        Company having to do with a subpoena,  
8        third-party subpoena that was served on the  
9        Olson firm. The second major motion is  
10       defendants' motion to compel against  
11       plaintiffs.

12                I also understand that we have two  
13        informal issues to address. One is the  
14        privilege log issue that came up last week on  
15        the phone and I asked the parties to be  
16        prepared to talk today to me about what  
17        they're going to propose by way of either  
18        joint resolution or separate resolution for  
19        that matter. And then apparently there is an  
20        issue that came up with respect to a  
21        deposition that I think may be about to take  
22        place today or maybe not. But as I understand  
23        it, at least one of the parties wanted to  
24        raise it informally this morning. I wasn't  
25        here this morning so we couldn't do it then

1 and I agreed that I would hear it this  
2 afternoon, if both sides -- those parties to  
3 the dispute were willing to resolve that issue  
4 informally as well.

5 With respect to the deposition issue,  
6 the request that was communicated to me is if  
7 we're going to handle that one informally, we  
8 do so first because apparently that may bear  
9 on whether this deposition proceeds or under  
10 what circumstances and apparently it was  
11 scheduled to go forward today. So my  
12 suggestion is we address that issue first.

13 Then my intention was to address the  
14 motions surrounding the Olson subpoena so that  
15 we can get them out and on their way and they  
16 don't have to sit through the motion to  
17 compel. And then finally, the motion to  
18 compel by defendants. And then when we're  
19 done with that, we'll address the issue with  
20 respect to the privilege log.

21 So I don't know who made the phone call  
22 today about the deposition. Mr. Pace?

23 MR. PACE: Yes, Your Honor.

24 Jack Pace. It was one of my colleagues called  
25 the court this morning to raise this issue,

1       and it really does relate both to the  
2       deposition scheduled for today and I suppose  
3       has sort of larger scheduling implication of  
4       what happened this morning in terms of the  
5       deposition happening. So if I could and if  
6       Your Honor is willing to hear this issue  
7       first, I could briefly summarize the issue.

8                   THE COURT: Well, let me ask,  
9       have you had an opportunity to confirm with  
10      plaintiff's counsel about this issue, number  
11      one. And number two, are they agreeable to  
12      resolving this issue informally over the phone  
13      as opposed to through formal motion practice?

14                  MR. PACE: Well, Your Honor,  
15      we've -- I guess we've put the request to the  
16      plaintiffs to understand the basis for the  
17      cancellation of the motion and how it could  
18      get resolved and we haven't heard back in  
19      fact. And I think, as Your Honor will find  
20      out today, the -- it all relates to the filing  
21      of counterclaims yesterday with the  
22      defendants' answer and the issue -- even if  
23      the issue -- let me put it this way. Even if  
24      the issue doesn't involve the resolution of  
25      the specific deposition that was scheduled for

1       today, we have a related scheduling type  
2       question for Your Honor because it affects  
3       depositions scheduled tomorrow and next week  
4       that we need to get resolved and is the reason  
5       for the two individuals on the phone and a  
6       number of the lawyers who are sitting in the  
7       back of the courtroom today.

8                   THE COURT: All right.

9       Mr. Tietjen or Mr. Schutz, whoever would like  
10      to speak on behalf of plaintiffs, my question  
11      is are you willing to have the Court take on  
12      this issue informally so that we can get to  
13      the substance of it or no?

14                  MR. SCHUTZ: You need to get  
15      away, Mr. Pace. You are sick.

16                  Your Honor, the -- first, we are not  
17      willing to have it done informally.

18                  THE COURT: Okay.

19                  MR. SCHUTZ: But there's a  
20      bigger back story that I think you should have  
21      for 30 seconds here.

22                  Last night, without any previous notice  
23      to us, without any previous notice to the  
24      Court, without submitting a draft of any kind  
25      or a motion, they filed a 78 paragraph, 22

1 page antitrust counterclaim in this case and  
2 given for a host of reasons that we're more  
3 than happy to get into at least informally so  
4 the Court has some idea of the impact that  
5 that has on the expert deposition discovery  
6 schedule which was to commence today and we've  
7 got depositions scheduled next week. More  
8 than happy to get into that as background  
9 information.

10 But we intend to move to strike that  
11 pleading and seek a protective order with  
12 regard to anywhere they intend to go with  
13 these expert depositions and that's why the  
14 expert deposition was canceled. We think that  
15 that's probably best left with some level of  
16 briefing so the Court can get the whole story.

17 THE COURT: Let me, again  
18 trying to address the logistics here, if it is  
19 not going to impact whatever happens in the  
20 proceeding of the deposition this afternoon or  
21 this expert deposition that was apparently  
22 scheduled for today, then what I would like to  
23 do is tee up this issue at least to get a  
24 better sense of what the issue is at the end  
25 of this formal motion so, again, we're not

1 holding up nonparties and then we'll talk  
2 about it then.

3 If there was something that was going  
4 to affect whether a deposition proceeded this  
5 afternoon or not and the parties were in  
6 agreement to getting that resolved so it could  
7 go forward, I'd hear it now but I think it  
8 makes more sense, even in light of  
9 Mr. Schutz's comment that he's not willing to  
10 informally resolve the issue, I would like to  
11 get my heads up on what the issue is but I'd  
12 prefer to do it at the end of this hearing  
13 when we go into the informal conference.

14 MR. PACE: Yes, Your Honor.  
15 If I just might very quickly because it does  
16 affect the schedule tomorrow.

17 THE COURT: I understand.

18 MR. PACE: And the reason  
19 that -- and the lawyers who are on the phone  
20 and those who are in the back of the room who  
21 otherwise, depending on what we say right now,  
22 will go to the airport and catch flights. So  
23 if I could just briefly, just to respond to  
24 what Mr. Schutz said, you know, as -- and the  
25 reason why we called Your Honor this morning

1 is because it really is of an extraordinary  
2 and unfortunate, in our view, development.

3 As you know, we're trying to pack in a  
4 very aggressive expert discovery schedule. I  
5 believe it's something like 11 expert  
6 depositions over the course of a three-week  
7 time period. The first one is scheduled to  
8 take place today. Yesterday on the deadline  
9 for the defendants to file their answers to  
10 the plaintiff's amended complaint, Trans Union  
11 and Experian filed answers with counterclaims  
12 and got a cryptic message from the plaintiffs  
13 last night, and I have copies I can provide to  
14 you, saying it's seemingly almost as  
15 punishment for the counterclaim that we  
16 received your counterclaim and the deposition  
17 scheduled for tomorrow and the deposition  
18 scheduled for Saturday are not taking place.

19 Now, the counterclaims are nothing to  
20 do with the deposition today and the  
21 deposition that everyone traveled here for on  
22 Saturday. We have lawyers already in  
23 Minneapolis who have incurred flight costs and  
24 hotel costs for those depositions and they  
25 have nothing to do with the counterclaims that

1        were filed. We promptly e-mailed the  
2        plaintiffs and said what's the basis for this,  
3        you know, abrupt cancellation. It has nothing  
4        to do with the counterclaims. We didn't get  
5        an answer.

6                We showed up at the Robins Kaplan law  
7        firm this morning for the deposition and were  
8        stopped at the door and told the deposition  
9        isn't taking place, go. We asked what's the  
10       basis? It has nothing to do with the  
11       counterclaim. It was Mr. Laris from the  
12       Robins firm who answered and said -- wouldn't  
13       answer. He simply said the deposition is not  
14       taking place. We then asked is the witness  
15       present so that we can find out if we get a  
16       resolution from the judge today should we stay  
17       in town so we can start the deposition this  
18       afternoon. He walked away and didn't even  
19       answer us.

20               And so we're left with the situation  
21       that the plaintiffs didn't seek a protective  
22       order last night or this morning to stop the  
23       deposition. They just seemingly, as  
24       punishment for us filing these unrelated  
25       counterclaims, sought -- basically had



1 self-help. They just canceled the deposition  
2 and stopped us at the door and now we incurred  
3 obviously the flight cost, the hotel cost, the  
4 court reporter fees, et cetera.

5 And so our main two issues for Your  
6 Honor, and we can resolve them whenever is  
7 agreeable to everybody, are, number one, we  
8 incurred those costs. The plaintiffs didn't  
9 seek a protective order and that was the  
10 background and we will be seeking our costs  
11 associated with coming out here to the  
12 deposition and all the lawyers who did. And  
13 number two, we have depositions scheduled  
14 tomorrow and next week. We have lawyers who  
15 are heading out to San Francisco for  
16 depositions next week and then others in  
17 Chicago next week, two in California and two  
18 in Chicago. So we need to know what happens  
19 next. In other words, we don't think because  
20 of the filing of the counterclaims that  
21 plaintiffs can unilaterally halt all  
22 proceedings in the lawsuit which seems to be  
23 what's happening.

24 And so that's the reason for what we  
25 think was sort of a pretty emergency request

1       this morning and this afternoon, Your Honor.

2                   THE COURT:   Okay.   Where are  
3       the -- today the deposition of the expert  
4       apparently isn't going forward.   Individuals  
5       flew in for that, I understand.   You talked  
6       about that there are lawyers who are about to  
7       get on planes today for depositions tomorrow?

8                   MR. PACE:   No, Your Honor.  
9       The deposition tomorrow is also supposed to  
10      take place in Minneapolis and they're here.

11                  THE COURT:   And the lawyers  
12      are here?

13                  MR. PACE:   Yes.

14                  THE COURT:   All right.   So  
15      and -- so they're not -- we don't need to  
16      decide this issue immediately as it relates to  
17      today and tomorrow in the next hour or so in  
18      terms of how it affects people's plane plans,  
19      other than if they're not taking depositions,  
20      I assume they'd like to go home today and not  
21      tomorrow.

22                  MR. PACE:   We don't know if  
23      the witness of today is here.   Like I said,  
24      the plaintiffs didn't tell us, but we were  
25      informed it was unilaterally canceled so I

1       suppose you're right, there was nothing going  
2       on this afternoon.

3                   THE COURT: All right. Here's  
4       what I want to do, then, on this issue. I  
5       want to address the Olson motion first  
6       because, as I said, we got third parties here,  
7       sitting here. Their motion is actually the  
8       first one that was scheduled for today and I  
9       want to address their motion. Then when we're  
10      done with that, I want to hear what's going on  
11      for today tomorrow even though, and I  
12      understand there are larger issues here, and  
13      Mr. Schutz you've indicated that you wish to  
14      have this resolved by motion practice, but I  
15      want to hear more about your response to that  
16      but I want to do that after we've at least let  
17      those who are parties to this lawsuit go and  
18      then we'll get into the motions to compel and  
19      the balance of the issue related to the  
20      privilege log.

21                   So let's do this, then. We have a  
22      motion to compel and then a companion motion  
23      for a protective order by the Olson group.  
24      I'd like to -- who will be arguing on behalf  
25      of the defendants on the motion to compel?

1 MR. JONES: I will, Your  
2 Honor.

3 THE COURT: It will be  
4 Mr. Jones, is that correct, on behalf of  
5 Olson? And I'm assuming both motions could be  
6 handled together. They seem to be the flip  
7 side of each other. All right.

8 I want to let you know just because I  
9 am going to control the amount of time that  
10 we're expending on all of these matters, with  
11 respect to your motion, I'm going to allot a  
12 total of a half hour in total on this, 15  
13 minutes per side, to address the issue with  
14 respect to the subpoena. Do not feel like you  
15 need to use all your time. That would be fine  
16 too. I've read all the papers on both sides,  
17 the reply that was filed by defendants, and  
18 the cases that were cited by both sides. So  
19 I'm very familiar as to what's going on. My  
20 law clerk is going to attempt to use the  
21 timers here.

22 And so who's -- Mr. Pace, is that you?  
23 Apparently down on your podium there, once  
24 Steve gets it started, you're going to see  
25 presumably a green light and then you're going

1 to see a yellow light.

2 MR. GARDNER: Your Honor?

3 THE COURT: Yes.

4 MR. GARDNER: Your Honor, this  
5 is Jim Gardner. If it's easier for the Court,  
6 Mr. Milne and I don't need to be on the  
7 phone -- I'm speaking for Mr. Milne but I  
8 think this is right -- for any of the motions  
9 that were scheduled for today.

10 THE COURT: Then we could --  
11 if you were to call my chambers and talk to  
12 Tara Craft who's the person who transferred  
13 you in here, then we could call you when we're  
14 ready to get to what I assume you want to be  
15 involved in which is this issue regarding the  
16 depositions.

17 MR. GARDNER: Yeah, that's  
18 correct. And everybody doesn't have to go  
19 through all of the microphone stuff for our  
20 benefit. So if it's okay with you, we will  
21 hang up now and then do you want us to -- how  
22 do you want to do this? Do you want us to  
23 call Tara Craft in your chambers and ask her  
24 just to give one of us a call --

25 THE COURT: Yes.

1 MR. GARDNER: -- when we're  
2 ready and then I'll connect the other one on?

3 THE COURT: That would be  
4 fine. That would be good. So if you call our  
5 main chambers number, the 1190, Tara will  
6 presumably answer the phone and you can give  
7 her the number where she should call.

8 MR. GARDNER: Okay. Good. I  
9 think that will work out better for everybody.

10 THE COURT: Just so you know,  
11 I'm estimating, based on the amount of time  
12 that I'm allotting for this motion and the  
13 other motion to compel, that it will probably  
14 be about an hour and a half before we call you  
15 back.

16 MR. GARDNER: Okay. Thank you  
17 very much.

18 THE COURT: All right. Thank  
19 you.

20 MR. GARDNER: Bye.

21 THE COURT: I assume Mr. Milne  
22 was agreeable to that because he just got hung  
23 up on.

24 MR. PACE: It plays out  
25 exactly that way very often, Your Honor.

1 THE COURT: All right. Do you  
2 see somewhere there on the podium there should  
3 be a green light or -- it's up there. All  
4 right. Then do you want to -- will there be a  
5 yellow light?

6 UNKNOWN SPEAKER: A yellow  
7 (unintelligible).

8 THE COURT: So if you want to  
9 reserve time, then, and quit earlier, that's  
10 fine too.

11 MR. PACE: Okay.

12 THE COURT: All right. Let me  
13 just ask a quick question. I'm using up some  
14 of your time but here is my question for you  
15 as it related to this motion with respect to  
16 Olson. The issue is compensation, whether  
17 they should be compensated or not. Initially  
18 the defendants took the position that all they  
19 should be compensated for was copying costs  
20 and basically the printing and copying costs.  
21 In the reply defendants said no, we're  
22 agreeable to pay reasonable, actual costs.  
23 And the focus clearly both in your initial  
24 moving papers but in the reply was on the fact  
25 that they're trying to charge you consulting

1 fees and 100 or \$125 an hour for things that  
2 appear to be -- certainly some of the events  
3 seem very clerical and wouldn't necessarily  
4 require someone at 100 or \$125 an hour to do  
5 them.

6 So my question to you is are the  
7 defendants now prepared to pay reasonable  
8 actual costs for Olson's review, retrieval,  
9 inspection, and production or are you still  
10 talking about that the only cost you think you  
11 should have to incur are the copying and  
12 printing costs?

13 MR. PACE: The answer to the  
14 first question is yes, Your Honor, but we  
15 interpret --

16 THE COURT: Yes -- you better  
17 tell me what my first question is because I  
18 asked multiple questions.

19 MR. PACE: Are we willing to  
20 pay reasonable, actual costs and we interpret  
21 reasonable to mean the way we define them in  
22 the papers. And Your Honor pointed to the two  
23 different ways it was put in our opening brief  
24 and our reply brief and I can clarify it was  
25 not meant to be a difference. Our position is



1       that whatever the actual costs are that Olson  
2       will have to act to spend and by that we would  
3       include printing, copying, if there are data  
4       retrieval costs, for example, if information  
5       is stored on a backup tape, sometimes that  
6       needs to be restored and that costs something.  
7       You have to get a consultant to do it.  
8       Whatever, you know, the data let's say costs,  
9       whatever those hard actual costs are, we --  
10      the defendants are willing to pay. To the  
11      extent --

12                   THE COURT: Well, let me -- go  
13      ahead.

14                   MR. PACE: I'm sorry, Your  
15      Honor. To the extent that Olson is seeking us  
16      to pay anything above that that would include  
17      the hourly rates, the standard hourly rates,  
18      however discounted slightly for  
19      their employees, that their employees would  
20      effectively charge their clients to spend time  
21      moving around and finding documents and  
22      complying with the subpoena, we are not  
23      willing at this time to pay those costs. We  
24      believe that the obligation to pay costs comes  
25      up only if the costs are significant. We

1 don't think these costs are significant under  
2 the rules and we think that we're required to,  
3 when we lived up to this obligation, to take  
4 reasonable steps to minimize the burden.

5 THE COURT: All right. Let me  
6 make sure I'm being explicit when I talk about  
7 what you're willing to pay for. You did talk  
8 about data retrieval apart and in addition to  
9 copying and printing. Let's assume that as  
10 part of the retrieval and review process they  
11 need to use a lawyer to look through the  
12 documents to make sure that they are  
13 responsive to the subpoena, make sure that  
14 they are relevant, make sure that they are not  
15 privileged, for example. In your response  
16 when you say you're willing to pay reasonable  
17 costs, would that include reasonable  
18 attorney's fees, for example, in the review  
19 process or review for -- or maybe they need to  
20 mark it confidential, something like that  
21 where a lawyer or some outsider gets involved?

22 MR. PACE: The answer is no,  
23 it wouldn't include that, Your Honor,  
24 primarily because that hasn't been part of the  
25 discussions at all to date. I mean, the

1       proposal from Olson was that the costs that  
2       they would incur would be essentially the  
3       revenue they wouldn't be able to collect  
4       because their employees, not hiring a lawyer  
5       to look at documents or anything else, but  
6       they would be their employee time to go and  
7       spend time gathering documents and identifying  
8       them.

9                   THE COURT:   And this would be  
10       employee time.   Let's assume you're right,  
11       that they're going to use in-house people.  
12       It's employee time, not lawyer time.   And  
13       these presumably are employee time that would  
14       be revenue generating if they were doing  
15       something other than answering your subpoena.  
16       You're saying you shouldn't be obligated to  
17       pay any portion of that even the underlying  
18       costs without a mark up for profit.   Is that  
19       what you're saying?

20                   MR. PACE:   Yes, Your Honor.  
21       We don't believe that the position taken by  
22       Olson up to this point was with the exception  
23       of their request for attorney's fees in  
24       connection with that motion.

25                   THE COURT:   Right.   Separate

1 from that.

2 MR. PACE: Separate from that  
3 has been at the time of issue here, the part  
4 we're disputing is the time that their  
5 attorney -- their employees would need to  
6 spend identifying responsive documents, that  
7 time which their employees couldn't spend  
8 doing other presumably revenue generating  
9 things. It's our position that that is not  
10 covered. That's not provided for by the rules  
11 and we do not need to cover those expenses if  
12 they are not significant expenses. And we  
13 think in light of the case law that they're  
14 not significant.

15 THE COURT: All right.

16 MR. PACE: And that generally  
17 does summarize our position, Your Honor. The  
18 two primary issues are, in our view, are the  
19 costs significant and -- because it's only if  
20 they're significant under the rules and the  
21 case law that we would be required to  
22 reimburse them for those costs and we think  
23 here they are not in light of the cases that  
24 we cite and they cite. And particularly  
25 because of the fact that this is not a

1 situation like pretty much every case that's  
2 been cited where we have an overbroad subpoena  
3 or anything like that. Here we've taken many,  
4 several steps to adequately limit the scope of  
5 the subpoena by time, custodian and subject  
6 matter.

7 And the second issue is whether they're  
8 entitled to attorney's fees. And I think the  
9 cases, particularly the cases that they cite,  
10 the Green Tree case which Judge Erickson is  
11 very clear that even in that case attorney's  
12 fees are provided for if there's some type of  
13 breach of responsibility for a party to take  
14 reasonable steps to minimize the burden of the  
15 subpoena or the word misuse is used in the  
16 practice commentary that they cite. If  
17 there's some type of misuse of the subpoena  
18 power, if that happens, then you may be  
19 entitled, the third party may be entitled to  
20 attorney's fees. And that is clearly --  
21 there's nothing in the record that shows  
22 anything like that, particularly in light of  
23 our efforts to narrow these requests.

24 A few words briefly on the responses  
25 from Olson to our motion and their affirmative

1 motion for protective order. The only case  
2 they cite that comes anywhere close to this  
3 amount of money being determined as  
4 sufficiently significant to be -- to require a  
5 cost shifting to the subpoenaing party is the  
6 Williams v. Dallas case cited in their -- in a  
7 few places but in particular in their  
8 opposition to our brief. And I think in that  
9 case the costs were about -- it was ten years  
10 ago but the costs were about \$10,000 or \$9,000  
11 similar to the costs here I think. But there  
12 were few very significant differences in that  
13 case. That was the case about the NFL player,  
14 just things going on in the courthouse  
15 today --

16 THE COURT: I had to look to  
17 see if it was the same one. Apparently so.

18 MR. PACE: And I think Eric  
19 Williams was the Cowboys lineman there who was  
20 suing a number of entities and on its -- he  
21 subpoenaed a number of lawyers who represented  
22 parties for the other side and the court went  
23 out of its way to mention up front and  
24 throughout the opinion that the subpoena  
25 was -- the words it used were overbroad on its

1 face and deposition and documents from two  
2 individuals. And in light of the overbreadth  
3 of the subpoena and what it would cost these  
4 two individual lawyers, they determined that 9  
5 or \$10,000 in expenses was significant,  
6 sufficiently significant that they shouldn't  
7 have to pay those costs and order the  
8 subpoenaing party to bear those costs.

9 Here we think that's significantly  
10 different than the situation here. We're not  
11 obviously talking about two individuals. We  
12 cited briefly I realize but briefly some  
13 material in our opening brief about Olson as a  
14 company and \$170 million in revenue recently.  
15 And certainly they're more capable of covering  
16 the cost than the two individuals were in the  
17 Williams case.

18 And in addition, another factor that  
19 the court relied on in Williams was, again, it  
20 goes to was there a misuse of the subpoena  
21 power. How overbroad, how overreaching was  
22 the subpoenaing party being. There the  
23 court -- the subpoena there specifically  
24 sought and Williams went after privileged  
25 documents. I mean that was one of the reasons

1       they went after attorneys. He was asking  
2       specifically for privilege documents. And the  
3       court, perhaps offended by that or not,  
4       factored into that the decision about whether  
5       cost shifting was appropriate.

6               And then very briefly, Your Honor,  
7       Olson also relies on three orders from --  
8       three unpublished orders from this court.  
9       Different judges in the District of Minnesota  
10      in support of their opinion. And just briefly  
11      on those, the Green Tree decision which they  
12      talk about the most from Judge Erickson, again  
13      similar to the points I made above. You know,  
14      in setting up the decision on page 2, Judge  
15      Erickson said, according -- you know, while  
16      KPMG contends that the subpoena is overly  
17      broad and that owing to that overbreadth, the  
18      plaintiff should reimburse KPMG for its costs.  
19      In other words, it's in part a function of  
20      exactly how reasonable has the subpoenaing  
21      party been in trying to narrow -- in seeking  
22      documents in the first place and seeking to  
23      narrow the burden on the third party. And  
24      that's clearly a different situation from what  
25      we have here. I think we put this in our



1       reply brief that in KPMG there were at least  
2       53 document requests being interpreted  
3       broadly. Here we have one and we've limited  
4       it to -- we've limited the time period  
5       dramatically.

6               We've taken a guess, it's imperfect,  
7       but we took the people who we knew from Olson  
8       who we thought worked on the project, we gave  
9       the names to Olson and said if this looks  
10      right to you, search these nine people's files  
11      for this one project, the Fair Isaac project,  
12      which, by the way, is probably why they don't  
13      need lawyers to review the documents because  
14      our request is simply who worked on the Fair  
15      Isaac project relating to VantageScore,  
16      identify those documents. There may be a  
17      privilege review or something but I'm not  
18      sure. And that's what you produce. So it's  
19      significantly different than the cases cited  
20      by the plaintiff. Judge Erickson goes through  
21      the Rule 45(C)(1) analysis in his opinion in a  
22      way that I think is very relevant. He cites  
23      45 -- Rule 45(C)(1) and specifically says that  
24      subpoenaing party shall take reasonable steps  
25      to avoid imposing due burden and that if the

1 court on behalf of which the subpoena issued  
2 shall enforce this duty and impose upon the  
3 party or attorney in breach of this duty, so  
4 it has to be -- there must be a breach of the  
5 duty of being reasonable to trigger the  
6 responsibility to pay expenses in the first  
7 place. And that's not what we have here.

8 And the Court goes on to cite the  
9 language from the rule that says such an order  
10 to compel production shall protect any person  
11 who is not a party or an officer of the party  
12 from significant expense. Again, this whole  
13 analysis is triggered only if the court  
14 determines that the expenses are significant.

15 And finally, on Green Tree, the court  
16 in Green Tree also mentioned that the revision  
17 to Rule 45 did not change the prior rule that  
18 still exists. And this is on page 6 of the  
19 court's decision under which a nonparty still,  
20 even in light of Rule 45(C)(1) and the change  
21 in the protections incorporated therein and  
22 which a nonparty can still be required to bear  
23 some or all of its expenses where the equities  
24 of a particular case demand it.

25 And so if that's the case, then, Your

1 Honor still -- then they still may be entitled  
2 to -- they still may be required to pay all of  
3 their expenses and yet we're offering to pay  
4 the reasonable actual expenses limited to  
5 copying, printing, and data costs.

6 The same issue -- I won't go into  
7 detail. I know my time is short but the same  
8 issue is --

9 THE COURT: If you want time  
10 to respond, you may -- I see you're already  
11 into your four minutes. You may choose to --  
12 I have read these cases extensively so you may  
13 want to hear from Mr. Jones and then use the  
14 time in rebuttal.

15 MR. PACE: Okay, Your Honor.  
16 The only other thing I'll note just quickly,  
17 then, is that with respect to -- it's similar  
18 with respect to request for attorney's fees  
19 and the Linder factors but I guess I'll use my  
20 last couple minutes in reply.

21 THE COURT: All right.

22 MR. PACE: Thank you, Your  
23 Honor.

24 THE COURT: All right. Thank  
25 you. Mr. Jones.

1 MR. JONES: Thank you, Your  
2 Honor.

3 THE COURT: While Mr. Cottriss  
4 is setting you up here on the time, let me  
5 tell you the question that I have for you  
6 which is you lay out an itemization of what  
7 your client estimates to be hours associated  
8 with various parts of this search and  
9 retrieval and production but it doesn't appear  
10 to me that it would be appropriate even if I  
11 were to grant some relief, that I would be  
12 ordering them to pay 100 or \$125 for at least  
13 some components of this production which  
14 clearly appear to me to be clerical in nature  
15 whether it be making copies or printing. This  
16 is something one of our interns could be  
17 doing. So I want to make sure you're  
18 addressing for me what it is -- how they  
19 set -- I want to understand how they set 100  
20 and 125 an hour.

21 MR. JONES: I can address that  
22 simply, Your Honor. I agree that standing in  
23 front of a copying machine making copies, you  
24 shouldn't get paid \$100 an hour to make  
25 copies. We estimated the general amount of

1       time that we thought we could undertake the  
2       task that was being asked of us. And a  
3       significant amount of that time is spent  
4       trying to make sure that we identify actual  
5       relevant documents, you know, through -- and  
6       retrieve housed data documents and not  
7       involving actual spending time copying the  
8       documents.

9               All we ask for is to be reimbursed for  
10       the time that we spent trying to comply with  
11       their subpoena. We didn't ask for an  
12       exorbitant amount of money. We didn't ask  
13       for, you know, crazy amount of hours. But it  
14       does take a significant amount of time to do  
15       the work that they're asking us to do.

16               THE COURT: Who is going --  
17       when you say it's going to take a significant  
18       amount of time for us to do the work, who is  
19       going to be doing the work?

20               MR. JONES: Employees of Olson  
21       will be doing the work.

22               THE COURT: All right. So  
23       they're going to be the ones who are going to  
24       look at the subpoena and go make the effort to  
25       retrieve the information sought by the

1 subpoena and review what's pulled up and  
2 decide if it's responsive to the subpoena and  
3 they will be the ones doing the copying or  
4 printing and production and lawyers will not  
5 be involved?

6 MR. JONES: We have not been  
7 charged with any task in making sure that the  
8 documents comply with the subpoena.

9 THE COURT: And where does the  
10 100 or a hundred and a quarter per hour come  
11 from? Where is that -- what's the basis of  
12 that figure?

13 MR. JONES: Olson has a wide  
14 range of fees that they charge for tasks. The  
15 low end of what Olson charges is between 100  
16 and \$125 an hour. This is, you know, bargain  
17 rate.

18 THE COURT: What would they  
19 normally be charging someone -- what kind of  
20 services would they be performing in their  
21 regular ordinary course of business for 100 or  
22 a hundred and a quarter an hour?

23 MR. JONES: Basically it would  
24 be comparative to what the particular project  
25 was being asked to do. If the task is

1 recreating, you know, documents and data  
2 that's on a file, you know, computer people  
3 that, you know, work in-house for Olson to do  
4 that or, you know, people that are low end  
5 account people that can review various  
6 documents to make sure that they are related  
7 to the actual Fair Isaac project. It's --  
8 we're not going to take John Olson of Olson  
9 and company and his rate and have him review  
10 the documents. That's not --

11 THE COURT: I bet he wouldn't  
12 agree to.

13 MR. JONES: Probably wouldn't.  
14 And so we tried to, you know, we tried to  
15 limit the amount of money. We tried to  
16 resolve it.

17 And basically from my understanding  
18 that the project -- this is just -- Olson was  
19 never actually employed by Fair Isaac. There  
20 was a request for proposal or an RFP where  
21 Olson went up and they said can you put  
22 something together for us. We put something  
23 together for us and we were never hired. That  
24 proposal that was created was actually -- has  
25 already been provided to the defendant. Now

1 defendants want to go on a fishing expedition  
2 to determine what maybe was said between Olson  
3 internally in creating this project, I don't  
4 know. They're entitled to go on their fishing  
5 expedition. We don't care. We're not arguing  
6 that it's irrelevant. We're not making --  
7 saying that there's not a responsibility to  
8 provide this document -- these documents to  
9 them. But it's not -- I don't believe that  
10 the rules are set up for us to subsidize their  
11 fishing expedition. I think that's the point  
12 of Rule 45. And the changes of Rule 45 are  
13 simply that, that it, you know, pay for what  
14 you want and we'll give it to you.

15 THE COURT: Let me ask a  
16 question. I assume the hourly rates that  
17 Olson charges for these types of individuals  
18 to perform these types of duties have built in  
19 some sort of profit margin.

20 MR. JONES: I'm sure that they  
21 have some. I don't have any idea what those  
22 are or what they would be.

23 THE COURT: Okay.

24 MR. JONES: And I have not  
25 asked for that material. There's a couple



1        comments that were made by Mr. Pace that I'd  
2        like to address.

3                    THE COURT:    Certainly.

4                    MR. JONES:    Quickly.    One, he  
5        made a comment about Olson has \$175 million in  
6        revenue and that's false.    Olson has had -- if  
7        he knows anything about the advertising  
8        business, Olson has \$175 million in billings.  
9        And what that means simply is that companies  
10       that Olson created the advertising for spent  
11       that much money on advertising.    They paid it  
12       to NBC or CBS or print.    Olson doesn't --  
13       that's not their revenue.    That's billings and  
14       that's a much different thing than a  
15       \$2 billion corporation versus something very  
16       significantly less than, you know,  
17       \$10 million.    And so I think that's  
18       inaccurate.

19                   Second, he's made --

20                   THE COURT:    Are you prepared  
21       to share with the Court what Olson's revenues  
22       indeed are if their 170 million number isn't  
23       correct?

24                   MR. JONES:    Today I am not  
25       prepared to share that number with the Court

1           because I don't know it.

2                       THE COURT:   All right.

3                       MR. JONES:   Second, he made --  
4           he stated the reasonable steps that the  
5           defendants took to limit the subpoena.  Their  
6           limitations are illusory limitations.  Limit  
7           your scope of the documents to the time that  
8           you worked on the project versus infinity.  
9           Limit the amount of -- limit your production  
10          of documents for people who -- to people who  
11          worked on the project as opposed to infinity.  
12          I mean, that's not a real limitation.  I mean,  
13          limiting, you know, data retrieval, you know,  
14          there are real limitations to complying with  
15          the subpoena.  None of them were made by  
16          defendants in this case.  I mean, it's just  
17          not true that there was any meaningful  
18          limitation to any of the requests that was  
19          made.

20                      All we want is simply to be reimbursed  
21          at a reasonable amount for the time that we  
22          spent.  And reasonable is something more than  
23          the cost, the hard costs for creating a  
24          printed piece of paper.  There is time that is  
25          spent and required and I think it's only fair

1 and only reasonable in a case where we're not  
2 involved in the litigation. We're not  
3 employed by Fair Isaac. We're not continuing  
4 to work for Fair Isaac. We have no interest  
5 at all in what happens in this litigation to  
6 be reimbursed for a reasonable time and  
7 reasonable costs for producing those  
8 documents. Now, that's all we ask for.

9 We even voluntarily offered to decrease  
10 the amount that we would be charging them by  
11 25 percent which was, you know -- which offer  
12 was blown off by defendants. And they said  
13 we'll pay you for your copying costs. Well,  
14 what -- I mean, we're going to have to spend  
15 100 hours of time to complete this project and  
16 defendants say, well, that's not significant,  
17 \$12,000 is not significant amount of costs.  
18 Well, I think that \$12,000 is significant. My  
19 client thinks that \$12,000 is significant.  
20 There's no equitable reason for us to be  
21 involved in this case that would justify us  
22 paying any of those costs.

23 I just simply wish the Court to issue  
24 an order saying that we should get paid  
25 reasonable time that we -- for the reasonable

1 time that we spend going for, looking through  
2 the documents, retrieving the documents and  
3 providing those documents to the defendants.  
4 Should we get paid by the hour at \$100 for  
5 standing in front of a copying machine making  
6 copies? No. And I simply ask that the Court  
7 allow Olson its costs more than just the  
8 copying cost for complying with the subpoena.

9 THE COURT: Okay. Thank you  
10 very much. Mr. Pace, anything further?

11 MR. PACE: Yes, Your Honor.  
12 Very briefly. With respect to -- just to  
13 clarify the record. With respect to the  
14 limitations imposed or offered by the  
15 defendants in Olson's compliance with the  
16 subpoena, I mean, we certainly didn't mean  
17 them to be illusory. I mean, by limiting the  
18 time period we were clarifying it to the  
19 specific time period of the life of  
20 VantageScore after March of 2006. And to the  
21 extent -- because our initial subpoena was  
22 broader than that, if that didn't have any  
23 affect on the -- on the actual scope of  
24 documents in Olson's possession, this is the  
25 first we're hearing of it. But we did limit

1 the time period. We did limit the topics of  
2 the subpoena. It's one request. And  
3 significantly we limited the custodians. I  
4 mean, we made very clear that while on the one  
5 hand a discovery request in litigation  
6 generally and a subpoena would call for a  
7 search throughout, you know, potentially  
8 throughout a company, we made clear that we  
9 would be more than happy to have an  
10 identification of the handful of employees who  
11 actually worked on the project so we don't  
12 have to get into some type of broad searching  
13 of e-mail files or central files. Identify  
14 who worked on the project and we'll agree with  
15 you. We'll take your word for it and you can  
16 search those individuals' files.

17 In response to the general point  
18 about -- which, again, is sort of the first  
19 we're hearing of this, that oh, you really  
20 shouldn't worry about this problem generally  
21 because we actually weren't really hired. We  
22 didn't really do anything. There were  
23 recommendations in several of the documents  
24 and work done that are attached to our opening  
25 motion, recommendations made by Olson which we

1 know were acted upon and are part of the Fair  
2 Isaac strategy in advertising tactics in this  
3 case which are central issues in the case.

4 And whether or not that was all sort of part  
5 of some informal relationship such that there  
6 was never a contract, I don't know, but we  
7 identified documents that we've seen that have  
8 actual recommendations that relate to key  
9 issues in the case that we think are relevant.

10 And I guess that's probably supported, if it  
11 takes -- if it's going to take them a hundred  
12 hours to sort of search for this stuff, that  
13 would seem to suggest there might be something  
14 out there. I guess Mr. Jones did also confirm  
15 that the rates that he was quoting were the  
16 rates charged to clients with a profit margin  
17 and that's what we've been saying all along.

18 And finally, we haven't really focused  
19 on it but I just want to say for the record  
20 that the request for attorney's fees for the  
21 briefing, for anything else, you know, is  
22 really extraordinary and just something should  
23 be said about it. There -- you know, as I  
24 said briefly at the beginning, attorney's fees  
25 can be called for if a party breaches its

1 duty.

2 And Judge Erickson put it very well,  
3 breaches its obligation to be reasonable and  
4 doesn't narrow its request, misuses a  
5 subpoena. The cases say that. Olson's  
6 opposition to our motion makes clear their  
7 basis for their fee request. It's at page 8  
8 of their brief, the second half of that  
9 paragraph. Defendants have refused any  
10 attempt at compromise. The record rebuts that  
11 directly but I'll go on. Refused any attempt  
12 to compromise and have forced Olson to bring a  
13 motion for protective order, I'm not sure  
14 about that, and respond to this motion to  
15 compel. Because of defendants intransigence,  
16 Olson should be awarded its attorney's fees  
17 and costs. In other words, their whole basis  
18 for their fee request is that we -- they think  
19 we're wrong, I guess, and we disagree with  
20 them and we think that's certainly not  
21 provided for by Rule 45.

22 THE COURT: Okay. Thank you.

23 MR. PACE: Thank you.

24 MR. JONES: May I respond

25 to --

1 THE COURT: Yes.

2 MR. JONES: -- something

3 Mr. Pace said?

4 THE COURT: Yes.

5 MR. JONES: Mr. Pace just made  
6 a comment which I found extraordinary. He  
7 said that it was the first time that he's ever  
8 heard that their limitations wouldn't have  
9 anything to do with limiting the scope of  
10 responding to the subpoena. If you look at  
11 Exhibit F to our initial motion, it's an  
12 e-mail to Bryan Gant of his law firm and  
13 Mr. Pace where it actually says, as I have --  
14 as -- they've informed me, as I suspected,  
15 that the definition you furnished does not  
16 appear to limit the scope or the search that  
17 they will have to make. What he just said was  
18 not true.

19 And as far as our request for  
20 attorney's fees goes, there just seems to be a  
21 pattern and practice from the defendant of  
22 offering something that is nothing and saying  
23 that it's reasonable and forcing these issues  
24 to a head which seems like in -- where normal  
25 people should be able to respond and work them



1 out. We're forced to come and deal with this  
2 issue because defendant would not respond to  
3 our, you know, I think pretty simple request  
4 to be, you know, reimbursed for the time we  
5 spent on this in responding to the subpoena.

6 So I think that there is a breach of  
7 the subpoena power and there's a bully aspect  
8 to the subpoena power being used by the  
9 defendants and bully aspect to the litigation  
10 process that's being used, and I do think  
11 those are the significant reasons to be  
12 awarded attorney's fees.

13 THE COURT: All right. I'm  
14 going to issue my order here from the bench.  
15 It will be followed up in a written order.  
16 I'm going to be -- I suppose what I would say  
17 is granting each motion in part and denying  
18 each motion in part.

19 So the decision is this. I do find  
20 that the expenses that this subpoena on Olson  
21 will cause them to incur significant expenses  
22 and that these are expenses that should be  
23 reimbursed by the defendants. And so my  
24 decision is that the defendants will bear the  
25 costs of the production of what they refer to

1 as their limited subpoena for costs associated  
2 and that the Olson firm will incur for  
3 retrieval, identification, review and  
4 production of documents which are responsive  
5 to the limited subpoena.

6 That will include reasonable costs for  
7 not only retrieval, that is computerized  
8 retrieval but people involved in the  
9 retrieval, the actual review of the documents  
10 by individuals at Olson to make sure that  
11 those documents are responsive to the  
12 subpoena. It will involve their production  
13 and collating, printing those costs as well.

14 So it will include, just so I'm clear,  
15 not only the hard costs as defendants refer to  
16 it but the time associated with this process  
17 that Olson will incur that they would  
18 otherwise be incurring on revenue generating  
19 activities.

20 Having said that, as part of the  
21 decision for reasonable rate, the hourly rate  
22 that Olson will be permitted to submit as  
23 reasonable costs will not include a profit  
24 margin. And so, Mr. Jones, you will need to  
25 explore with your client but I'm talking about

1 the basic costs and not the additional profit  
2 margin that they would otherwise be charging  
3 to their clients. I will not set an amount in  
4 advance or a fixed amount that the Olson firm  
5 is going to incur basically because I don't  
6 think I have adequate information to do that.  
7 I recognize the rules would permit it but I  
8 really find at this point that while I  
9 appreciate the effort thus far that the Olson  
10 firm is trying to estimate the time it will  
11 take them, I find it more in the form of a  
12 guesstimate than a really good estimate. And  
13 so I'm not going to fix a particular amount.

14 I am going to do what Magistrate Judge  
15 Erickson did in his case and that is require  
16 that after Olson retrieves and produces the  
17 information, that they submit a bill to  
18 defendants with an itemization of their hours,  
19 their costs without profit, and the services  
20 that they -- a description of the services  
21 associated with those hours and costs to  
22 defendants. If defendants, after reviewing  
23 that bill, determine that they believe it's  
24 reasonable, then they'll pay it. If they  
25 believe it's not reasonable or any portion of

1       it isn't reasonable, then the parties will  
2       confer to try and resolve the dispute. And if  
3       you can't resolve the dispute, then,  
4       Mr. Jones, you'll bring the matter to my  
5       attention and I will resolve what is a  
6       reasonable amount of reimbursement to your  
7       client. You can submit that in the form of a  
8       formal motion or it can also be submitted by  
9       the parties through letter submissions to the  
10      court with attachments so as to encourage the  
11      parties to spend any more time or attorney's  
12      fees on resolving this issue of what's  
13      reasonable.

14               I am not going to award any attorney's  
15      fees to the Olson firm for bringing their  
16      motion for a protective order or defending the  
17      defendants' motion. Here the defendants  
18      offered some relief, obviously not the relief  
19      that the Jones firm wanted. I don't find it's  
20      adequate and I am giving them what I do think  
21      is adequate but they did offer some relief.

22               And I also find, to be honest, that the  
23      Olson firm or response that we're entitled to  
24      100 or \$125 an hour for items that clearly no  
25      one is going to be billing that kind of time

1       for copying, printing, a lot of those issues  
2       could have been resolved without having to  
3       bring that matter to the court, so I'm not  
4       going to award attorney's fees to the Jones  
5       firm for bringing their motion for a  
6       protective order or defending the defendants'  
7       motion.

8               Just so I'm clear, the basis of this is  
9       under Rule 45(C)(2)(b). That rule provides  
10      that the third party cannot be made to bear  
11      significant expenses. I find that this amount  
12      of time that the Jones firm is being asked to  
13      incur is significant. I recognize that the  
14      advisory comments and cases suggest that  
15      sometimes the producing party can be asked to  
16      bear some of the expense or all of the  
17      expense, but I think the Exxon Valdez case is  
18      clear is that you can ask the party to do so  
19      if the equities would suggest that it would be  
20      more fair to ask the producing party who's not  
21      a party to the litigation to bear some or all  
22      of those expenses. And I don't find any of  
23      those factors to be present here that are  
24      articulated in the Valdez case or the Linders  
25      case that picks that up as well. The Olson

1 firm is a nonparty. It doesn't have any  
2 interest in this litigation or the outcome of  
3 the litigation. This isn't a situation where  
4 they can better accommodate the cost than the  
5 defendants whether they're a multi-million  
6 dollar company or a multi-billion dollar  
7 company. It's clear to me both sides can  
8 certainly bear the expense. That's not going  
9 to be a driving force. And while I'm sure the  
10 parties think this litigation is of public  
11 importance, I don't think that this was the  
12 driving issue, that that is an issue that will  
13 resolve this matter. So I don't find any of  
14 the equities present to ask the Olson firm to  
15 pick up the costs of the subpoena.

16 Again, the rules do allow me to set a  
17 set amount or fixed amount in advance. I  
18 don't find that that would be appropriate here  
19 and I don't find that an award of attorney's  
20 fees is appropriate in this situation. So for  
21 all of those reasons, I am granting your  
22 respective motions in part and denying them in  
23 part. And as I said, I'll be issuing an order  
24 consistent with this ruling.

25 That said, Mr. Jones, do you want to

1           come up to the podium. Can you share with us  
2           when -- how soon your client can respond to  
3           the subpoena?

4                       MR. JONES: I don't have a  
5           very good answer. We estimated it would take  
6           us two to three weeks when we initially got  
7           the subpoena. I assume that's still true.  
8           The only concern I have right now is we have  
9           two holidays that are showing up and holidays  
10          that are Wednesday and Thursday. Most people  
11          are having those Fridays off as well during  
12          that time period. So two to three weeks is  
13          probably still accurate. I don't know if this  
14          two to three weeks is probably the best -- the  
15          best two to three weeks to make that -- you  
16          know, the middle of January is probably, you  
17          know, is probably enough time to get the  
18          documents together.

19                     THE COURT: All right.  
20          Mr. Pace, any comment on the timing of that?

21                     MR. PACE: No, Your Honor.  
22          (unintelligible) provide, of course, Your  
23          Honor's schedule. We have a deadline of  
24          January 5 for hearing dates on nondispositive  
25          motions and while I, hearing everything I've

1       heard today, certainly don't expect any future  
2       disputes with respect to this production, if,  
3       as a technical matter, if it comes in after  
4       January 5, of course, if there are follow-up  
5       issues required, then --

6                       THE COURT:   You can bring them  
7       to my attention.   And obviously, I would  
8       expect the bill would come with the production  
9       and that if there are issues, that would be  
10      probably after the date as well and I would  
11      certainly entertain that issue at that time.

12                     Well, I'm going to order, then -- today  
13      is the 5th of December so I'm going to order  
14      that they -- let's see.   Do you have the  
15      calendars?

16                     MR. JONES:   I have a calendar,  
17      Your Honor.

18                     THE COURT:   Good.   I'm glad  
19      you do.   What's that -- the Monday around like  
20      the 8th of January, somewhere there?

21                     MR. JONES:   The 8th is a  
22      Thursday.   The 12th is a Monday.

23                     THE COURT:   All right.   Let's  
24      do the 9th of January, then, so that gives  
25      your client basically a little over a month



1 taking into account the holidays here.  
2 Obviously, if they can get it done sooner, I  
3 would encourage them to do so because a lot  
4 of -- there's a lot of things that are  
5 happening with these parties. The sooner it  
6 gets in their hands, the sooner they'll know  
7 what they need to do with it.

8 MR. JONES: I appreciate that,  
9 Your Honor. And just to be clear, do you want  
10 me to send those documents to you Mr. Pace or  
11 to local counsel?

12 MR. PACE: You can send them  
13 to local counsel.

14 MR. JONES: Okay. Great.  
15 Thanks.

16 THE COURT: All right. Thank  
17 you very much. Actually, I think that what I  
18 had said may have been inaccurate. When we  
19 had Mr. Gardner and Mr. Milne on the phone, I  
20 think I said that we would do this in an hour  
21 and a half and I think I was thinking I would  
22 do the defendants' motion next as opposed to  
23 the informal issue with respect to the  
24 depositions. But I'm still not hearing that  
25 it will affect anything that happens today.

1 It's really what happens tomorrow. So let's  
2 go forward and hear the defendants' motion to  
3 compel.

4 Let me share with you how I want to  
5 address the timing of this issue and how I  
6 actually want to approach generally hearing  
7 the motion. What I want to do is, my  
8 intention is to have each document request or  
9 group that belongs grouped together addressed  
10 first by defendants, then by plaintiffs. So,  
11 for example, first we're going to address  
12 document request No. 8 out of the seven set of  
13 document requests. I'm going to hear  
14 defendants on it, plaintiffs until we're done  
15 hearing about that. I'm going to hopefully  
16 rule at that time.

17 We're going to go on to, then, document  
18 request 11, 30, 35 of the seventh set of  
19 document requests. Then we'll move to the  
20 ninth set and I will -- I'm going to address  
21 document request 1 to 3 as one group, document  
22 request 10 to 12 as the second group, and  
23 document request 5 to 7 as a third group where  
24 I'll hear both sides and then hopefully be  
25 able to issue an order at the conclusion of

1       hearing argument with respect to those  
2       document requests.

3               Again, I want to control the amount of  
4       time that gets spent on this because I want to  
5       encourage you to focus on issues that are not  
6       in your papers. I've read them. I've read  
7       your exhibits, and so I may have questions for  
8       you. But in other words, I don't want you to  
9       spend your time repeating what you've already  
10      written to me.

11             So for document request 8 and 11 and 30  
12      I'm going to let you each spend five minutes a  
13      piece on those document requests. With  
14      respect to document request 35 of the seventh  
15      set and then the last three sets, categories  
16      of document requests of the ninth set, I'm  
17      going to allow you to spend ten minutes on  
18      each side for each one of those document  
19      requests. So document request 1 to 3 of the  
20      ninth set defendants get ten minutes,  
21      plaintiff gets ten minutes. Same with  
22      document request 10 through 12 and document  
23      request 5 through 7 having to do with the  
24      Blaze Advisor. So Steve will be keeping track  
25      here.

1                   Why don't we start, then, with document  
2           request No. 8. Who will be arguing on behalf  
3           of defendants? Well, you sure got the short  
4           end of the stick, Mr. Pace.

5                   MR. PACE: I'm losing my  
6           voice.

7                   THE COURT: Yeah, right.

8                   MR. PACE: Your Honor, if I  
9           might suggest, you know, one possibility. The  
10          way -- and this might be evident or this might  
11          be hinted at by some of the briefs, a couple  
12          of the issues have been sufficiently narrowed  
13          that the amount of time that I likely would  
14          spend -- I can't speak for the plaintiff -- on  
15          some of these issues would be, you know, like  
16          on request No. 8, may literally be a minute  
17          and request 11. And so, for example --

18                  THE COURT: I was trying to be  
19          generous by telling you you had five minutes.  
20          So I think that the issues have been teed up  
21          for me but I wanted to give both sides an  
22          opportunity to add anything if they wanted to.

23                  MR. PACE: Absolutely. And I  
24          guess all I'm possibly proposing is that  
25          potentially if -- I mean, I could group 8, 11

1 and 30 together.

2 THE COURT: That would be  
3 fine.

4 MR. PACE: This way we don't  
5 have to get up three times, if that's okay  
6 with plaintiffs.

7 MR. COLLYARD: That's fine,  
8 Your Honor.

9 THE COURT: All right.

10 MR. PACE: Okay. Your Honor,  
11 as you saw, the parties spent a lot of time in  
12 the correspondence, the e-mails, the briefs  
13 pointing fingers at each other and identifying  
14 who was right and who should have been  
15 withdrawing their motion or produced documents  
16 earlier. I won't do that here. I think you  
17 have the whole record. And I'm sure you enjoy  
18 it even less than we do reading this stuff.

19 What are the opening issues. The open  
20 issues, each request that we're going to talk  
21 about today does have -- does still have some  
22 open issue even if it's been substantially  
23 narrowed by the requests. For example, even  
24 if a particular agreement has been reached  
25 after a motion to compel has been filed, what

1 we're talking about is potentially something  
2 as simple as having the plaintiff identify  
3 where the responsive documents were because we  
4 didn't see them in the first place and maybe  
5 they're there.

6 The first one is request No. 8. These  
7 are the documents that relate to the  
8 relationship with the Magnum firm. And very  
9 simply, Your Honor, as papers make clear,  
10 prior to the motion, we simply had one  
11 difference of position. The plaintiffs  
12 were --

13 THE COURT: Okay. And they  
14 said they produced it and now the issue is  
15 you're saying you can't find it and will they  
16 identify the Bates number, correct?

17 MR. PACE: Yeah. And it  
18 relates, just so the record is clear, a  
19 particular category of documents, prior to the  
20 motion, the plaintiffs were agreeing to  
21 produce documents relating to, and I hope this  
22 isn't an -- this is what we were basing it on.  
23 They were saying they would produce documents  
24 relating to the decision to hire or the  
25 decision to do with Magnum and they left out

1 and would not agree to produce, before our  
2 motion, the documents relating to the plans  
3 and strategies for actually going forward.  
4 That was the disconnect. That appears now to  
5 have been resolved. And so our only open  
6 issue is either they should, you know, be --  
7 they should produce it or if they've already  
8 produced it, they just identify those  
9 documents.

10 THE COURT: All right. So I'm  
11 clear, the only issue you're not confident  
12 that they've produced is the planning  
13 documents. You want to know have they  
14 produced them. If so, you're saying you can't  
15 find them so give us the Bates number or order  
16 them to produce them.

17 MR. PACE: Correct, Your  
18 Honor.

19 THE COURT: All right. I  
20 understand that issue. Let's go to No. 11.

21 MR. PACE: No. 11 is the  
22 document that relates to special pricing. And  
23 in other words, diversions from standard  
24 pricing. And the only open issue prior to the  
25 filing of our motion was what happens before

1       2003. After 2003, the plaintiffs represented  
2       that every special pricing request was  
3       memorialized in a spreadsheet that they were  
4       producing to us and that was satisfactory to  
5       us. And so the only question was how do we  
6       get at special pricing request prior to 2003  
7       and going back to 2001. After we filed our  
8       motion, the plaintiffs now say that they have  
9       produced those documents. However, they cited  
10      in their brief -- they cite two examples and  
11      we know there are certainly more than two.  
12      And so we'd like them to be ordered to produce  
13      those documents.

14             I'll make clear one thing. Their  
15      papers suggest that we would -- the defendant  
16      bureaus necessarily would have this very same  
17      type of information in their own files and  
18      that isn't the case, unfortunately. We're  
19      willing and we'll take full advantage of the  
20      information in our files but there are two  
21      exceptions. One is there are special pricing  
22      requests that from time to time get  
23      communicated initially from a lender and  
24      sometimes it gets memorialized and goes back  
25      through a bureau but sometimes it gets



1 initiated by a lender and in that case we  
2 might not be privy to it.

3 And then, of course, the other obvious  
4 category is Equifax. If there are documents,  
5 special pricing requests made through Equifax  
6 over the years, they're not a party anymore  
7 and those are not documents that we can  
8 control and get, necessarily get unless we --  
9 I suppose we could subpoena Equifax. So if  
10 indeed the plaintiffs have produced already  
11 the documents from 2001 to 2003 reflecting  
12 every special pricing request --

13 THE COURT: Well, that's what  
14 they've said several times to you. So the  
15 question is -- and then I saw where  
16 Mr. Collyard used by way of example they were  
17 attached to his declaration as Exhibits 3 and  
18 4, two letters by way of example, although the  
19 November 20, '08 e-mail from Nelson to Chris  
20 Sullivan which was Collyard declaration 2 said  
21 they had produced them as well.

22 Are you saying you want to know if  
23 these two letters are it or if there's more,  
24 you're saying you can't find them and give us  
25 the ID numbers?

1 MR. PACE: Correct, Your  
2 Honor.

3 THE COURT: All right. Let's  
4 move on to document request 30, then.

5 MR. PACE: And 30 is the  
6 documents relating to statements made by their  
7 COO and very --

8 THE COURT: They said they've  
9 produced, they've produced, they produced.

10 MR. PACE: Our problem before  
11 the motion was simply that they were saying  
12 they produced documents and it was limited  
13 to -- there was a limitation. You know, I  
14 think it was limited to, quote-unquote, broad  
15 based scoring --

16 THE COURT: They said now they  
17 didn't restrict it that way.

18 MR. PACE: Absolutely. And  
19 this is one we spent some time the last few  
20 days looking and haven't seen anything.

21 THE COURT: So you want them  
22 to identify the documents by Bates number.

23 MR. PACE: Yes, Your Honor.  
24 And in fact, if the issue is now they haven't  
25 said this, if the issue is we've looked and

1       there's nothing, well, I guess I hope that's  
2       not the situation because I at least took from  
3       their answer is that they had something and  
4       they actually produced it and that wasn't sort  
5       of a backward way of saying that there isn't  
6       actually any documents. But whatever it is,  
7       you're right, Your Honor. The question is  
8       they should simply identify it.

9                   THE COURT: All right.

10                  MR. PACE: If you'd like, I  
11       can stop or I can go on to 35.

12                  THE COURT: No. Let's stop  
13       here. Mr. Collyard, I'll give you 15 minutes  
14       to address those three.

15                  MR. COLLYARD: I only need  
16       about 15 seconds.

17                  THE COURT: Oh, good.

18                  MR. COLLYARD: I'm not going  
19       to talk about any of the events that led up to  
20       the motion. I'm sure you sensed my  
21       frustration in the briefing.

22                  THE COURT: Yes, I did.

23                  MR. COLLYARD: And I made  
24       this -- I tried to make this very, very, very  
25       easy for you. And what the defendants have

1       done here is entered into a practice of  
2       bringing a motion. We say we produced it.  
3       They say well, we can't find the documents,  
4       make them identify them for us. With these  
5       three particular requests we went ahead and  
6       did that. And we sent Jack Pace an e-mail I  
7       believe sometime around, I don't know, 12:30,  
8       1:00. So we didn't know if we'd be able to  
9       get it done before the hearing. We did it  
10      so --

11                   THE COURT: So you've  
12      identified by Bates number the responsive  
13      documents to document requests 8, 11 and 30.

14                   MR. COLLYARD: That's right.

15                   THE COURT: All right. And  
16      your position is that everything has already  
17      been produced and now here's the Bates  
18      numbers.

19                   MR. COLLYARD: Exactly.

20                   THE COURT: All right.

21                   MR. COLLYARD: Yep. We just  
22      wanted to not even make this an issue, Your  
23      Honor.

24                   THE COURT: You're right.  
25      Pretty close to 15 seconds there.

1 MR. COLLYARD: Thank you.

2 THE COURT: All right.

3 Mr. Pace, anything else on document request 8,  
4 11 and 30?

5 MR. PACE: No, Your Honor.

6 With that representation on the record, I'll  
7 take it.

8 THE COURT: All right. Well,  
9 with respect to document request 8, 11 and 30,  
10 my order was going to be that the plaintiff  
11 identify by Bates number those documents that  
12 were responsive to those document requests as  
13 agreed to by the parties as to what was going  
14 to be produced. And if indeed Mr. Collyard's  
15 office has already done that, then you've just  
16 complied with my order.

17 All right. Let's move on to document  
18 request No. 35 which has to do with the  
19 documents used by the Fair Isaac's employees  
20 for these various public statements that were  
21 the subject matter of the requests for  
22 admissions, the second set of requests for  
23 admissions.

24 MR. PACE: And, Your Honor, I  
25 think at issue here --

1 THE COURT: And here you're  
2 getting ten minutes for this one.

3 MR. PACE: Okay. Thank you.  
4 I won't need anywhere close to that.

5 I think there are really four documents  
6 at issue. It's two press releases and two  
7 earnings call transcripts. And I believe the  
8 only dispute that sort of surfaced as a result  
9 of the briefing was that the plaintiffs were  
10 offering to -- indicating that they would  
11 agree to identify documents used by the  
12 individual -- individual employees if they  
13 happen to have been identified in a  
14 particular, by name, in one of these press  
15 releases or transcripts. And our only  
16 difference was that we didn't accept that  
17 limitation because in a number of cases we  
18 didn't know -- for example, a press release is  
19 a good example or statement where we  
20 understand that there may be a lot of people  
21 working behind the scenes to support a  
22 statement made by the COO or the CEO. And so  
23 that limitation we don't know all the Fair  
24 Isaac employees who were involved in putting  
25 out a public statement. And from our

1 perspective the limitation was that I'm sure  
2 this is easy -- maybe I'm wrong. We are  
3 assuming, and I could be wrong, that this was  
4 relatively straightforward for them to find  
5 out whoever, for these four documents, whoever  
6 the employees were who were responsible for  
7 putting together those statements, the two  
8 press releases and the statements made on the  
9 two earnings calls, whoever they were, just  
10 what documents did they use in making those  
11 statements.

12 THE COURT: Let me make sure I  
13 understand what you're asking them to produce  
14 because this isn't clear to me for me. Are  
15 you seeking to have them produce -- I'm going  
16 to call this -- this is my term, not one you  
17 all used, either side -- the source documents  
18 for these four -- the two press releases and  
19 the two statements or are you asking them to  
20 produce the source documents for the  
21 statements which are the subject of your  
22 request for admissions?

23 MR. PACE: The former, Your  
24 Honor. The source documents for the  
25 statements in the press releases and the two

1 earnings call transcripts.

2 THE COURT: No. I want to  
3 make sure I'm clear about it. Your request  
4 for admission says we're referring to this  
5 press release, we're going to ask you now  
6 request for admissions regarding it, and then  
7 you go through line by line as to what -- a  
8 statement that you pull out of a particular  
9 press release or statement that you want them  
10 to admit is true. And I'm assuming that this  
11 is not every statement, every sentence that  
12 was in those respective documents, those four  
13 documents. Am I right?

14 MR. PACE: Correct.

15 THE COURT: All right. So  
16 what I ask you, are you asking them to provide  
17 the source documents for the statements that  
18 you wanted them to admit in your request for  
19 admissions or are you asking them to provide  
20 the underlying source documents for those  
21 four, the two public -- or I'm sorry, press  
22 releases and the other two documents?

23 MR. PACE: It's those  
24 statements from those four documents that were  
25 identified in our request for admissions. So



1       it's -- we've narrowed it and identified the  
2       statements.

3                   THE COURT:   All right.   And  
4       then at one point it sounds like there was --  
5       I don't know if the plaintiffs were offering  
6       this as a solution but I saw that the  
7       defendants rejected it but I want to make  
8       sure.   If they were to produce all documents  
9       that were relied upon by whatever employees  
10      made those statements that are the subject of  
11      your request for admissions, relied upon by  
12      them, and produce those documents, would that  
13      be adequate?

14                   MR. PACE:   It would, Your  
15      Honor.   Just --

16                   THE COURT:   Whoever those  
17      employees are because apparently you don't  
18      know the names of all the employees who made  
19      the statements that show up in the press  
20      releases or these other statements.

21                   MR. PACE:   Yes, Your Honor,  
22      whether or not named.   With that addition,  
23      we're -- that would be satisfactory.

24                   THE COURT:   So if they were to  
25      produce -- whether the employee was named or

1 not, they can find out what employees made  
2 those statements. If they were to produce the  
3 documents relied upon by those named or  
4 unnamed employees to make the statements that  
5 are the subject matter of your request for  
6 admission, that would be adequate for you?

7 MR. PACE: That would be, Your  
8 Honor, yes.

9 THE COURT: All right.  
10 Anything else that you wanted to add?

11 MR. PACE: No, Your Honor.  
12 Not on 35.

13 THE COURT: All right. Why  
14 don't I hear, then, from Mr. Collyard on that.

15 MR. COLLYARD: You had the  
16 same exact confusion that I had.

17 THE COURT: All right. We've  
18 cleared it up.

19 MR. COLLYARD: You probably  
20 saw that in my e-mail to Mr. Pace, but I still  
21 don't know if I understand exactly what's at  
22 issue here. Because I asked -- you know, I  
23 asked Mr. Pace in my e-mail if they were  
24 limiting it to the particular statements in  
25 the --

1 THE COURT: He said -- now he  
2 said yes.

3 MR. COLLYARD: -- confirm  
4 that.

5 THE COURT: Yes.

6 MR. COLLYARD: Now, the only  
7 misunderstanding that I still have is, is it a  
8 document -- let me step back. Okay? There  
9 have been many document requests in this case  
10 where this type of thing has come up about the  
11 statements that people have made. And for  
12 each of those we've limited it to the actual  
13 documents that the people actually relied on  
14 when making those statements. I just want to  
15 make sure I understand that what is meant by  
16 the underlying source documents. So if it is  
17 actually a document that, let's say, for  
18 example, Mark Green, the CEO of Fair Isaac had  
19 when he was making a statement, if he was  
20 looking at that, relying on that to make that  
21 particular statement, that is what I was  
22 offering to produce in the first instance.  
23 And I just want to make sure to see if I have  
24 the same understanding that you have now.

25 THE COURT: Well, let me

1 ask -- I would prefer to ask Mr. Pace if  
2 that's what he meant before I give my  
3 understanding of this.

4 MR. PACE: No, Your Honor.

5 That -- that points to one slight disagreement  
6 that we had. We didn't -- we were concerned  
7 in the negotiations that this was being  
8 limited to, let's say a statement made about  
9 profit margins in an earnings call and, you  
10 know, new information to us, we see it for the  
11 first time in an earnings call. So we would  
12 like some document establishing that, whatever  
13 the source material for it is. The way it was  
14 being articulated to us in the negotiations  
15 and the way it was just articulated by  
16 Mr. Collyard, I believe, was if it so happens  
17 that Mark Green had a piece of paper in his  
18 hand and he was relying on a particular  
19 document to make that statement, then we'll  
20 give it to you. But if not, if instead, it  
21 was based on just information -- you know,  
22 something other than that specific precise  
23 document, then there's nothing to give you.

24 And I guess the reason that wasn't  
25 satisfactory to us was because we were

1 envisioning several scenarios where there  
2 might be other documents that would fall  
3 outside of that definition that we would be  
4 missing. You know, for example, if he gets  
5 regular briefings from his executive team  
6 with, you know, the results projections, et  
7 cetera, and based on that information he  
8 makes -- he goes and makes a statement on an  
9 earnings call that's newsworthy, then under  
10 that articulation, we don't get that source  
11 material even if it's one document because  
12 it's not the specific thing he relied on.

13 THE COURT: Is that how  
14 your -- is that what you were proposing, so  
15 I'm clear?

16 MR. COLLYARD: What I was  
17 proposing is that it's a document that the  
18 speaker actually used, actually relied on,  
19 speaking statement --

20 THE COURT: Let's use, then,  
21 the example Mr. Pace used. So Mr. Green has  
22 briefing with a number of employees about a  
23 particular item that he's going to speak on in  
24 a public matter and he gets briefed and they  
25 hand him different -- he reads a bunch of

1 different materials or they report to him  
2 orally from a bunch of different materials and  
3 from that he gets up and makes a public  
4 statement for which he has clearly relied on  
5 materials prepared by others in order to make  
6 those statements. Under what you're proposing  
7 defendants wouldn't get that document?

8 MR. COLLYARD: That's right  
9 because think about how I have to go about  
10 searching for this, Your Honor. We've got 77  
11 of these different statements and it's not  
12 just one statement in a statement. It's lines  
13 of statements. I would then have to go to  
14 Dr. Green and say, all right, now think about  
15 these 35 statements that they have listed for  
16 you. Each and every one of these we have to  
17 figure out if you've ever used anything at  
18 all, whether you were briefed on any of these,  
19 how did you come to learn this information  
20 because now we got to figure out the  
21 underlying information that gave you the  
22 knowledge. That becomes impossible to search  
23 for, Your Honor.

24 THE COURT: All right. Then  
25 I'll continue to hear your argument and we'll

1 get back to you, Mr. Pace.

2 MR. COLLYARD: That is the  
3 only argument that I want to make on this,  
4 Your Honor.

5 THE COURT: All right. Well,  
6 then let me ask a question because in your --  
7 the way I read your statement -- the way I  
8 read your client's response to the request for  
9 admission, I'm going to use this word in  
10 quotes, my word not yours or the other side's,  
11 they equivocated. In other words, they say --  
12 they don't just admit the statement is true.  
13 The way the statement is propounded or the  
14 request for admission is admit that this  
15 particular sentence is true as of this date  
16 and your client doesn't say admit, what they  
17 would say generally is in the context of which  
18 that statement was made they believed it to be  
19 true as of this date.

20 MR. COLLYARD: Right.

21 THE COURT: Which suggests to  
22 me some equivocation which is driving why the  
23 defendants want to get at the equivocation.  
24 So I want to get back to what was going on  
25 there with what I'm calling the equivocation

1 or some wiggle room, creation of some wiggle  
2 room here.

3 MR. COLLYARD: See, this is  
4 why it's hard to talk about this in a vacuum.  
5 I don't know that that was done for each and  
6 every one of these 77 statements that they've  
7 cited and you got to consider what the actual  
8 statement is. So certain things are dated  
9 back in time. Their actual request for  
10 admission is admit that it's true. Okay.  
11 Does that mean that it's true today? Did that  
12 mean that it's true back then. Okay. A lot  
13 of these things are just statements, people  
14 talking.

15 THE COURT: When I went  
16 back -- I will admit that I didn't go read all  
17 of them but the ones I all read all said admit  
18 that this particular statement true as of the  
19 date it was made, this as of February 2, 2005.  
20 Didn't say is it true today. The next  
21 companion request for admission is did your  
22 client -- did you ever retract it. Answer,  
23 no.

24 MR. COLLYARD: But you got to  
25 remember on those particular statements



1       it's -- some of those things are not things  
2       that you could just actually admit as being  
3       true. It's someone just talking. Did that  
4       particular person believe that it was true at  
5       the time that it was made. That's what we're  
6       saying in those particular statements. Some  
7       of those you cannot just come out and say yes,  
8       that was absolutely true. We have no reason  
9       for knowing that, Your Honor. That was what  
10      was so difficult about that and we tried to  
11      explain that to the defendants.

12                   THE COURT: All right.  
13      Anything further on behalf of your clients on  
14      No. 35.

15                   MR. COLLYARD: No, Your Honor.

16                   THE COURT: All right.  
17      Mr. Pace, anything further that you want to  
18      add on this?

19                   MR. PACE: No, Your Honor.

20                   THE COURT: All right. I'm  
21      going to take that one under advisement at  
22      least for while we're here. I'm hoping I will  
23      issue an order on it before we leave here but  
24      I need to think a little bit more about what  
25      to do with document request No. 35. So I'm

1 going to move on at this point to the ninth  
2 set of document requests.

3 And the first ones I want to address  
4 are document requests 1 to 3 related to FICO  
5 2008 having to do with, as I understand it,  
6 the date by which plaintiffs need to produce  
7 documents through. Mr. Pace.

8 MR. PACE: Your Honor  
9 identified the open issue with respect to 1 to  
10 3. It's actually a similar issue with respect  
11 to 10 through 12 and that is just what's the  
12 cutoff date. There's an agreement to produce  
13 documents and the question is how hard do they  
14 have to produce documents.

15 For the FICO '08 documents, as we set  
16 forth in the papers that I won't repeat, our  
17 basis for asking for documents prior to the  
18 motion -- prior to filing of our motion, the  
19 plaintiffs were offering to produce documents  
20 up to February 15. We didn't think that was  
21 sufficient because the reasons we cite. We  
22 attached a press release I think and some  
23 other things. There's been significant  
24 marketing activity, communications with  
25 clients and other things with FICO '08. It's

1 going to affect the future of VantageScore  
2 which is the central question in the antitrust  
3 claims and as a result it was -- that was the  
4 basis for our request for information  
5 post-February 15.

6 After the motion, the plaintiffs agreed  
7 to produce the documents up to May 28, I  
8 think, which I believe was the date of our  
9 requests and I think the only difference was  
10 that --

11 THE COURT: At some point I  
12 think it's Sullivan declaration Exhibit 16  
13 and, in fact, that at some point defendants  
14 did agree to produce it through the date of  
15 the request.

16 MR. PACE: That's right. And  
17 that may have been --

18 THE COURT: So why if it was  
19 good then, why isn't that a good agreement  
20 today?

21 MR. PACE: I guess because it  
22 may have been closer to the date of the  
23 request. In other words, at the time -- and  
24 you know, certainly time has passed and there  
25 are a lot of discovery issues that it appears

1 both sides are raising that with the deadline  
2 coming up for nondispositive motions are sort  
3 of coming up now, and just given the passage  
4 of time, it took us a couple of months to  
5 negotiate it and then there were a few months  
6 between the end of negotiations on this I  
7 think, too, maybe and then the time we filed  
8 our motion. We certainly understand that the  
9 basis for a limitation of produce documents up  
10 to the date of the request is generally that  
11 it just makes sense to have a fixed time so  
12 that you don't have to keep going back. It  
13 doesn't appear that the plaintiffs have done  
14 that. It doesn't appear, for example, that  
15 they said we've already produced documents up  
16 through a particular -- you know, up through  
17 May. So by your asking us to go to the  
18 present or, you know, November 24 I think was  
19 another alternative we put in our papers, that  
20 they would have to go back and do for a second  
21 time that which they've already done once.  
22 Rather, this is simply what we were treating  
23 as sort of a continuation of that sentiment.  
24 A continuation of the sentiment behind a sort  
25 of date of the request type of cut off. So

1       it's simply reflecting the passage of time  
2       that it took to negotiate the request and get  
3       the motion on file. And I think the offer was  
4       initially made closer to the date of the  
5       request and now we're in --

6                   THE COURT: It was made on  
7       August 8, 2008 by Mr. Sullivan and  
8       Mr. Collyard is when that offer was made  
9       through May 28.

10                  MR. PACE: So it's your  
11       position now that simply, you know, just given  
12       the passage of time and that we haven't been  
13       told by the plaintiffs that they would incur  
14       any additional expense by having to go back  
15       twice. In other words, they've already done a  
16       search through May and now they have to go  
17       back and do it. We thought if they're going  
18       to be doing the search, then given the fact  
19       that this is a current topic that's ongoing  
20       and changing, they should just do it as of the  
21       current -- you know, up to the present time.  
22       That was the entire basis for the request,  
23       Your Honor.

24                  THE COURT: Okay.  
25       Mr. Collyard, I'm assuming it's you until

1           somebody else hops up from your --

2                       MR. COLLYARD:   It's going to  
3           be me for a while, Judge.

4                       THE COURT:   All right.  
5           They're all grinning.   They're all loving the  
6           fact that they don't have to come up here.  
7           All right.

8                       MR. COLLYARD:   Let me just  
9           show you the fundamental flaw in Mr. Pace's  
10          argument.   Okay.   It means that I could bring  
11          a motion here in the next three weeks for some  
12          dispute what we've had going way back and I'd  
13          say, Judge, because it was way back when, now  
14          I'm entitled to all of the documents up to the  
15          present.   And as I explained in the brief,  
16          that would completely eviscerate the whole  
17          rationale for agreeing to what we were calling  
18          an ongoing document request in which you put  
19          forth in your scheduling order.

20                      THE COURT:   All right.   Let me  
21          ask you a question, though.   I understand from  
22          your brief that you have, in fact, produced  
23          the documents requested by 1 through 3 with  
24          the agreed upon limitations through  
25          February 15, 2008.

1 MR. COLLYARD: That's right.

2 THE COURT: All right. And  
3 with respect -- have you to date produced any  
4 documents generated post-February 15, 2008?  
5 In other words, did you produce --

6 MR. COLLYARD: The answer to  
7 that is yes but have we made a complete  
8 production of these particular documents up to  
9 May 28? No, we haven't. And just let me back  
10 up and explain to you why is because during  
11 our negotiations, and this is probably clear  
12 in the brief, but during our discussions on  
13 these, we always thought that they were  
14 considering these to be ongoing document  
15 requests. And I kept telling Mr. Pace during  
16 these conversations it appears that the only  
17 reason why you have served these documents  
18 which were consumed by other document requests  
19 on May 28 is so that we would have to somehow  
20 make some type of production before the  
21 ongoing document request production is due in  
22 March of 2009. So for the first time in their  
23 motion did I learn that they really did not  
24 consider these to be ongoing requests. I had  
25 been treating them as if they were ongoing

1 requests.

2 THE COURT: Okay. So you get  
3 the letter from Mr. Sullivan on August 8 and  
4 he proposes through May -- that you produce  
5 documents through May 28, 2008 and then  
6 there's no response until right -- until this  
7 motion is filed.

8 MR. COLLYARD: No because even  
9 when I got Mr. Sullivan's letter that is the  
10 same argument that we had before, I had  
11 thought and they never told me otherwise that  
12 they were considering these to be ongoing  
13 document requests. And that was the  
14 fundamental disagreement that we had on these  
15 particular requests. So when I got their  
16 motion and they come out and say we are not at  
17 this time claiming that these are ongoing  
18 requests, that is when I said hey, if you're  
19 not claiming that these are ongoing requests,  
20 then, of course, we will produce the documents  
21 up to May 28. But what I do not want to have  
22 happen, Your Honor, is for them to then come  
23 back to you next week and say well, Judge, now  
24 that they've agreed to produce them up to  
25 May 28 and you've made them do that, now we



1 want these to also be considered ongoing  
2 documents requests. Because then we're back  
3 into the same position and the same discussion  
4 that Mr. Pace and I have already had numerous  
5 times now.

6 THE COURT: Okay. Anything  
7 further you want to add on that?

8 MR. COLLYARD: No, Your Honor.

9 THE COURT: All right.  
10 Mr. Pace, anything further you want to add on  
11 document request 1 through 3.

12 MR. PACE: No, Your Honor.

13 THE COURT: All right. With  
14 respect to document request 1 through 3, I'm  
15 going to order that those documents responsive  
16 to those requests as agreed to with the  
17 limitations be produced through August 8, 2008  
18 which is the date that was communicated by  
19 defendants to plaintiffs that they would limit  
20 the production through that date. I'm not  
21 going to order it through today. Obviously  
22 defendants could have brought this motion to  
23 compel several months ago and particularly  
24 when they got no response back from the  
25 plaintiffs on this. But I am going to order

1       that they be produced through that date, the  
2       date when it was offered by defendants and  
3       then no response came back from plaintiffs.  
4       Just so I'm clear, this is not right now  
5       governed by any ongoing production. If you're  
6       going to get into that, you're going to have  
7       to have your meet and confer and tee that up  
8       for me as to whether one side or another  
9       thinks this should be subject to ongoing  
10      production. This is obviously -- I viewed  
11      this as a new request. I didn't read the  
12      correspondence as defendants taking this  
13      position, this was part of ongoing  
14      productions. But nonetheless, I'll make it  
15      perfectly clear this is not subject to the  
16      ongoing production that we've already got in  
17      place under the scheduling order.

18             All right. Let's go to document  
19      requests 10 through 12. This has to do with  
20      the deterioration of Fair Isaac's credit  
21      restoring. And let me ask a question for you,  
22      Mr. Pace. The scenario I got here is that  
23      Mr. Collyard has put in a signed declaration  
24      and we have another declaration by another  
25      individual as well saying that you had agreed

1       that if they would go back to 2003, that the  
2       cutoff would be February 15, 2008. Ms. Nelson  
3       from plaintiff's office confirms that in an  
4       August 29 letter, which is Sullivan  
5       Exhibit 17, there's nothing in there where  
6       defendants ever said no in response to that  
7       letter. In fact, Exhibit 16 dated August 8  
8       from defendants seems to be suggesting the  
9       same solution. Your brief suggests that you  
10      told plaintiffs you rejected the whole  
11      proposal that it wasn't acceptable. You say  
12      that in your reply that these compromises were  
13      rejected. There was no cite in your reply so  
14      I confined anything where defendants ever even  
15      responded to the August 29, 2008 letter. It  
16      appears to me there was agreement of the  
17      parties to go back to 2003 and through  
18      February 15, 2008 and now defendants don't  
19      want to live with that agreement. That's what  
20      it looks like to me.

21                   MR. PACE: Okay. I  
22      understand, Your Honor. And I will say I  
23      don't -- while when we were preparing these, I  
24      personally didn't specifically recollect the  
25      making the offer of February 15 except I don't

1       dispute anything in their declarations, I take  
2       them at their word. The reason that we at  
3       this point were seeking any documents after  
4       February 15 was that -- I guess just to step  
5       back for a second, the context of that  
6       particular meet and confer, as with many of  
7       these meet and confers, is that we have a  
8       laundry list of many, many requests where  
9       we're going through one at a time making  
10      suggestions, making proposals. And in this  
11      particular request what I understand took  
12      place, and this is consistent with what the  
13      declarations say, is that I told them  
14      basically, look, this is what we're looking  
15      for here. And as of this time, based on the  
16      information that I have available to me, if  
17      you -- our offer will be, along with all the  
18      other things we're making an offer of  
19      compromise for, we'll cut off -- we'll do a  
20      cutoff of February 15.

21             Now, that was one of many compromise  
22      offers made in that particular phone call  
23      which was followed by a letter from the  
24      plaintiffs that effectively rejected many,  
25      many, many of the things that we offered

1       during that call. Now, I guess the reason  
2       that we're even here today still seeking  
3       documents after February 15 was that we  
4       thought that it was sort of unfair for them --  
5       for us to make a number of proposals which are  
6       sort of based contingent on an agreement and  
7       them to say we're rejecting a lot of these but  
8       we're going to pick and choose a couple and  
9       agree the limitations that are favorable to  
10      us, pick and choose those and agree and then  
11      live by those so at least we've now cut the  
12      universe and you can continue to negotiate  
13      with yourself, defendants, and just come back  
14      and as long as you move closer to us, we're  
15      not going to move closer to you. And so we  
16      saw that letter as really a rejection of a lot  
17      of the things we were doing and that's why we  
18      made the offer here today.

19             I will say, though, Your Honor, so it's  
20      clear, I have no interest in sort of going  
21      back on anything that we understood that they  
22      understood to be in agreement. And if Your  
23      Honor perceives it that way, I'm happy to live  
24      with the February 15 cutoff. But just to be  
25      clear, we saw that as really, their letter, as

1 a rejection of a lot of offers of compromise  
2 by us such that we didn't think it was really  
3 fair for us to have to be held to the one or  
4 two that they latched on to which happened to  
5 be favorable to them.

6 THE COURT: Okay.

7 Mr. Collyard. Let me ask a question. With  
8 respect to these document requests 10 through  
9 12, have plaintiffs produced the documents up  
10 through February 15 that are responsive to  
11 these document requests.

12 MR. COLLYARD: We did, Judge,  
13 and we actually did it a long time ago.

14 THE COURT: Okay. All right.  
15 I just wanted to clarify that. All right.  
16 Anything that --

17 MR. COLLYARD: The only thing  
18 that I'll even -- that I even think I need to  
19 respond to is obviously we didn't think that  
20 there was any condition on our agreement. We  
21 didn't think it was if we agreed to all of  
22 these issues today, then we'll live by this  
23 agreement.

24 Mr. Pace knows this. Every meet and  
25 confer we have we negotiate each document

1 request individually and that's how these were  
2 taken. I have nothing further, Your Honor.

3 THE COURT: All right.  
4 Anything further, Mr. Pace, on document  
5 requests 10 through 12?

6 MR. PACE: No, Your Honor.  
7 Thank you.

8 THE COURT: All right. I'm  
9 going to deny the motion on that. I do find  
10 that the parties had reached an agreement as  
11 of August 28 that the defendants would produce  
12 documents responsive to these document  
13 requests through February 15, 2008 and I do  
14 agree that at least as I have read through  
15 your various letters back and forth and as I  
16 would expect there will be negotiations as you  
17 go through each of these various discovery  
18 requests, some of which you'll reach agreement  
19 on, others you won't but I've never gotten the  
20 sense that it was an all or nothing bundling  
21 of either take everything or we're going to  
22 assume everything's off the table. And I  
23 certainly don't see, for example, defendants  
24 moving on everything that were the subject  
25 matter of various letters that went back and

1       forth between the parties. So in any event, I  
2       am denying the motion with respect to document  
3       requests 10 through 12 of the ninth set.

4               All right. Let's address, then, the  
5       Blaze Advisor or document requests 5 through  
6       7.

7                       MR. PACE: Finally, Your  
8       Honor, with respect to 5 through 7, the simple  
9       issue is why are we still talking about EDM.  
10      We had a motion on it. We have an agreed on  
11      protocol and then -- and we thought that was  
12      really the end of it. And then following the  
13      entry of that order, and I won't go through  
14      this in details, this is all in our papers,  
15      but following the entry of that order, then we  
16      listened in on another earnings call from the  
17      plaintiff where Mark Green, their CEO stepped  
18      back and said I'm going to discuss our EDM  
19      strategy. We're an EDM company now and I'll  
20      start with it all runs through Blaze Advisor.

21                    THE COURT: All right. And I  
22      read that and read the annual report from 2005  
23      and all of that and granted I am, as you all  
24      know, not savvy in this area but it certainly  
25      appears to me and what I see from the



1 declaration provided by Mr. Caretta, that it  
2 looks like to me that a Blaze Advisor is  
3 basically a computer software program that is  
4 licensed out to third parties to -- in which  
5 they're putting in their data and I don't see  
6 the connection to what is at issue in this  
7 lawsuit which is the ability -- which is the  
8 FICO scores and the ability to -- whether  
9 there's a monopoly or not or are there  
10 distribution channels or are there not. I  
11 just don't see, even if you assume that you  
12 were misled about what Blaze Advisor is, I  
13 don't see whether it falls under an EDM  
14 solution. It looks like an underlying  
15 software program from what I've been able to  
16 glean from what's been provided to me by the  
17 parties, including the various documents that  
18 you cited to me as well.

19 MR. PACE: Okay. Your Honor,  
20 that's our understanding as well that it's an  
21 underlying software program that clients use  
22 to help make their business decisions. And I  
23 think this really is the same issue that was  
24 before the court with respect to the prior EDM  
25 solutions. In connection with that, Your

1 Honor got a very similar declaration that said  
2 we don't -- we, Fair Isaac, don't explicitly  
3 market these particular programs, Triad, other  
4 things, with scores. We don't specifically  
5 say here, client, we're going to sell you this  
6 in a specific bundle. So what do we do about  
7 it? And so our answer last time was the same  
8 answer this time. How does that explain the  
9 public statement saying that they're going to  
10 leverage their abilities in one area, EDM,  
11 Blaze Advisor, et cetera, to stabilize their  
12 other areas like scoring. And the only way  
13 that that makes any sense is to the documents  
14 that we cited to the Court in connection with  
15 the last motion, they're internal documents  
16 that talk about EDM more generally, that --  
17 excuse me. I profess another reason why I'll  
18 stop soon. I promise. That while the  
19 information and the products or services  
20 aren't explicitly comarketed even if they're  
21 not, that the fact is that once you have one  
22 client signed up for one underlying  
23 decisioning service like EDM, then it's all  
24 the more -- it's a lot easier to get them to  
25 subscribe to or buy FICO scores because

1       they're already involved, they're already  
2       using our solutions, they're already using our  
3       systems and it's a lot easier now for us to --  
4       for them to use FICO scores that are  
5       automatically compatible with and as inputs or  
6       otherwise into the underlying software EDM or  
7       otherwise. And so even though -- and that's  
8       what the document said. The document said  
9       we'll leverage EDM solutions to sell more  
10      scores even though none of those particular  
11      programs were specifically marketed together.  
12      And that's supported by the documents that we  
13      subsequently got pursuant to the Court's  
14      order.

15               The documents that we got show a  
16      tremendous overlap between the client scores  
17      and the clients for EDM solutions. Now, that  
18      could be for a number of reasons. That could  
19      be because Fair Isaac is dominant in both and  
20      so that's just necessarily going to be the  
21      case. And if that's the answer, then I  
22      suppose that's the answer. But we were  
23      submitting that consistent with those  
24      documents and the public statements from their  
25      CEO, that that meant that getting people

1 subscribed to the Fair Isaac system in one  
2 area just made it easier and facilitated the  
3 purchase of scores or other things in another  
4 area. That was the only basis for the EDM  
5 motion in the first place.

6 So I agree, I haven't seen something  
7 specifically saying, and their declarations  
8 certainly don't say this, that the Blaze  
9 Advisor program is something that comes with  
10 FICO scores. I haven't seen that. We didn't  
11 see that before either and yet we sought all  
12 those documents discussing leveraging one  
13 versus the other. So it's really the same  
14 issue as before, Your Honor.

15 THE COURT: All right. Thank  
16 you. Mr. Collyard.

17 MR. COLLYARD: Thank you, Your  
18 Honor. Mr. Pace said that out of the  
19 documents that we produced from your March 20,  
20 2008 order that he saw the clients were  
21 clients that were scoring clients and clients  
22 that were also EDM clients so there's some  
23 connection. Of course, that's the case, Your  
24 Honor, because as you made a limitation in  
25 your order, you said that we only had to

1       produce documents from our top ten scoring  
2       clients. So we do have those clients who are  
3       scoring clients and who, with completely  
4       separate and apart items in their business,  
5       use EDM.

6               Now, Mr. Pace talks about references to  
7       cross selling and things like that. Those  
8       statements are made in connection with the  
9       overall EDM business. Cross sell use EDM  
10      applications to get more EDM applications.

11             But what I absolutely need to highlight  
12      for you, Judge, and this may have been clear  
13      from Mr. Caretta but it's so important that  
14      understand that why this doesn't make sense  
15      and why Fair Isaac could never use Blaze  
16      Advisor as a separate distribution channel for  
17      FICO scores is because we got to step back and  
18      look at FICO scores. Okay. All we have is an  
19      algorithm. That algorithm is housed with the  
20      bureaus. They have it. We can do nothing  
21      without the bureau's credit data. They  
22      actually take that data, apply it to the  
23      algorithm. They do this. They process it.  
24      They make the score and then they themselves  
25      distribute the score. In every instance in

1       which a client of anybody's gets a score, it  
2       comes from the bureaus, not Fair Isaac. That  
3       is why Mr. Caretta says that we could never  
4       use Blaze Advisor for a separate distribution  
5       channel for FICO scores.

6               Now, I also want to point out too that  
7       when we talked about EDM last time, you found  
8       some very minimal relevance and because of the  
9       overwhelming burden in going out and getting  
10      these things, you tailored your order to a few  
11      particular things. One of those things,  
12      though, was all of the contracts and the  
13      statements of work from 2005 up to  
14      September 15 of 2007. Fair Isaac has  
15      produced, Your Honor, somewhere around 540  
16      contracts and statements of use for that time  
17      period and that includes every single Blaze  
18      Advisor contract or statement of use --

19               THE COURT: Why would they  
20      have produced the Blaze Advisor contracts or  
21      statement of use if, in fact, Blaze Advisor  
22      wasn't covered by --

23               MR. COLLYARD: It was covered  
24      because it was out of -- out of all of the EDM  
25      products. You produce all those contracts for

1       that time period. And so we produced every  
2       single Blaze Advisor statement of work that we  
3       had for that time period. Now, this was back  
4       in -- I can't remember when our production  
5       was. Your order was March 20 so I think our  
6       production was somewhere around April-ish.  
7       Okay. And that was on the eve of when we  
8       really started getting into all these  
9       depositions and not once, Your Honor, in  
10      defending 30 of these depositions did I ever  
11      see the defendants mark a single document  
12      pertaining to EDM. They never noticed up a  
13      Rule 30(b)(6) notice on this issue. They've  
14      done nothing on this issue and it's gone  
15      nowhere, Your Honor. Their economist expert,  
16      as I pointed out in the brief, has never even  
17      given an opinion as to how EDM or Blaze  
18      Advisor specifically could be used as some  
19      type of separate distribution channel. These  
20      documents simply are not relevant, Your Honor.  
21      And Mr. Caretta explains that in detail.

22               But on top of that, Your Honor, not  
23      only do they have the 540 contracts for EDM  
24      and the statements of use that describe in  
25      detail exactly the statements of use, exactly

1        what is being done, they've never said why  
2        isn't that enough. They have all the Blaze  
3        Advisor stuff. Why should we have to go and  
4        get more. And as Mr. Caretta talks about, it  
5        would be a significant burden to go and do so.  
6        He talks about six different divisions of  
7        people that we would have to go and search.  
8        These are hundreds of people. We have nearly  
9        350 Blaze Advisor clients that we'd have to  
10       have these people look for. It would be an  
11       enormous burden. As he says, it would take  
12       hundreds upon hundreds of hours to do so. We  
13       request that their motion be denied, Your  
14       Honor.

15                        THE COURT: Let me see if I've  
16       got any other questions for you. I'm still  
17       not clear if -- I understood the position you  
18       were taking in your response is that Blaze  
19       Advisor is not part of the EDM solutions and  
20       that by agreement of the parties, Blaze  
21       Advisor wasn't one of the solutions that you  
22       had to produce documents on. And in looking  
23       at my order with respect to document request 4  
24       and 6 -- well, with 1 through 3 you were to  
25       produce the final contracts and statements of



1 work for the EDM solutions that were purchased  
2 from plaintiffs to the extent the documents  
3 exist. In agreement with respect to document  
4 request 4 and 6 is that you would produce any  
5 final presentations for Triad or Liquid Credit  
6 applications. In addition, you would produce  
7 the user guides for the following EDM  
8 solutions that were marketed or sold by them  
9 to the extent any such user guides exist for  
10 Triad, Liquid Credit, Capstone, Falcon and  
11 Debt Manager.

12 MR. COLLYARD: Right.

13 THE COURT: In other words,  
14 Blaze Advisor wasn't listed.

15 MR. COLLYARD: Right. So let  
16 me --

17 THE COURT: So where is it  
18 that -- just so I'm clear, I thought you were  
19 saying it's not an EDM solution but you're  
20 saying you produced it as part of the EDM  
21 solutions, the contracts and the statements of  
22 work.

23 MR. COLLYARD: So let me  
24 explain that for you. Blaze Advisor is one of  
25 the numerous applications that are part of

1 Fair Isaac's EDM business. Remember, Fair  
2 Isaac has its EDM business and then it has its  
3 scoring business.

4 THE COURT: Yes.

5 MR. COLLYARD: Separate and  
6 apart from its scoring business is the rest of  
7 its business which Fair Isaac refers to as its  
8 EDM business. As part of that EDM business,  
9 Blaze application falls within that. So on  
10 your order on all the contracts and statements  
11 of work, we produced all the contracts we have  
12 for Triad, Liquid Credit, Blaze Advisor,  
13 anything that's considered to be an EDM  
14 solution. Now, where we got down on the  
15 particulars was in the final presentations.  
16 Okay. So when you gave your order and  
17 Mr. Pace and I talked about what final  
18 presentations do we need, he chose Triad, he  
19 chose Liquid Credit as being part of the -- as  
20 being part of those EDM applications. Same  
21 with the user guides. And so what they're  
22 saying, Judge, they're saying well, we really  
23 would have chosen Blaze Advisor instead of one  
24 of these if you hadn't tricked us. And that's  
25 how the they tricked us argument comes in.

1 And I don't even need to go to that.

2 THE COURT: All right.

3 Mr. Pace, anything further?

4 MR. PACE: Yes, Your Honor.

5 Very briefly. Just in response to the  
6 argument about how this doesn't make any sense  
7 because the CRAs are our distributors after  
8 all and all we do is make an algorithm and  
9 then something happens, I mean, obviously if  
10 that was the end of the story, then none of  
11 the other documents about, you know,  
12 leveraging scores and other services would  
13 make any sense.

14 I mean, all of the -- Fair Isaac  
15 regularly meets with, and there are many  
16 documents that have been produced in the FICO  
17 '08 context, for example, where they are  
18 regularly meeting with customers, clients  
19 talking about FICO scores. They're out there  
20 marketing and selling FICO scores. Granted,  
21 in most cases it's the bureau who ultimately  
22 sells it but it's not true at all -- I mean,  
23 I'm not saying he was saying that but to the  
24 extent Mr. Collyard could be heard to be  
25 suggesting or the declarations could be

1 suggesting that Fair Isaac has nothing to do  
2 with being out there pushing its scoring  
3 services in the marketplace, that's certainly  
4 not true at all.

5 With respect to have we used the  
6 documents, we have used the documents.  
7 They're fairly straightforward. They're  
8 admissible evidence and they're going to see  
9 them in a few weeks in our summary judgment  
10 papers. The fact that we haven't used them in  
11 a deposition because they were coming in while  
12 depositions were ending has really -- is  
13 really here nor there.

14 And finally, with respect to the  
15 burdens associated with the production,  
16 Mr. Collyard is right. The Blaze Advisor  
17 stuff was included in the contracts that we  
18 got as a result of Your Honor's order. And so  
19 our requests 5 through 7 were specifically  
20 intended to track the remainder of the order  
21 that didn't cover contracts and we thought  
22 were narrowly tailored to get at the types of  
23 things that we thought actually weren't going  
24 to be that burdensome. Presentations, white  
25 papers, handouts used in connection with the

1 marketing or sale of Blaze Advisor, user  
2 guides and then documents sufficient to show  
3 market share. That last one could be a single  
4 document. So the user guides and the  
5 presentations from the negotiations with the  
6 plaintiffs before we were told or at least we  
7 came to understand that these were sort of  
8 standard sets of materials that were used that  
9 were often very duplicative that you didn't  
10 have to go to six divisions and a hundred  
11 employees to possibly get. If we're wrong  
12 about that, I suppose that's a conversation we  
13 probably should have had a few months ago  
14 about the burden but that's I guess why we're  
15 here today.

16 All we're looking for are those  
17 presentations, user guides in connection with  
18 Blaze Advisor. If Your Honor would like us to  
19 negotiate a limitation on that such that they  
20 don't have to go through six divisions and all  
21 those people to get, we're certainly happy to  
22 do that. Maybe standard user guides, if  
23 there's one, you know, if there's one that  
24 they use, the standard presentation, the  
25 standard white paper. Again, it was our

1           understanding that that's how the business  
2           worked. So what we were asking for here was  
3           probably only a handful of documents.

4                         THE COURT: All right.

5           Mr. Collyard, anything further?

6                         MR. COLLYARD: No, Your Honor.

7                         THE COURT: All right. With  
8           respect to document request 5 through 7 of the  
9           ninth set of document requests, I'm going to  
10          deny the defendants' motion for those  
11          documents related to Blaze Advisor. I'm going  
12          to do so for several reasons.

13                        First of all, I believe that that  
14          request was subsumed within document request  
15          No. 6 -- sorry. The six sets of documents  
16          that were the subject matter of ultimately a  
17          meet and confer by the parties and then what  
18          ended up being memorialized in my order of  
19          March 20, 2008. I find from the evidence that  
20          was presented to me by the parties in  
21          connection with their declarations and  
22          affidavits that the defendants were made aware  
23          of plaintiff's position on Blaze Advisor as of  
24          November 20, 2007. They responded by saying  
25          they disagreed with the position that

1       plaintiffs were taking about Blaze Advisor  
2       being -- that they disagreed and they would  
3       follow up with it in connection with the sixth  
4       set of document requests. They issued their  
5       sixth set of document requests and ultimately  
6       negotiated a resolution to it that took into  
7       account Blaze Advisor. I don't find that  
8       there is evidence that the defendants were  
9       somehow tricked into thinking that Blaze  
10      Advisor was something other than what  
11      plaintiffs represented it to be in their  
12      various documents that defendants have had  
13      access to.

14               Second of all, to be honest, you know,  
15      all things could have some relevance but I  
16      really find that the relevance of Blaze  
17      Advisor is, at best, marginally relevant and  
18      certainly the burden of searching for those  
19      documents greatly exceeds any tangential  
20      relevance that this particular EDM solution  
21      would have in this case. I just think it is  
22      way too far afield.

23               So on that basis, based on that I think  
24      it's governed by my March 20, 2008 order, the  
25      relevance in this case is, at best, marginal

1           and certainly the burden well exceeds the  
2           benefit that could be obtained from obtaining  
3           the documents sought by document request 5  
4           through 7. I'm denying defendants' motion  
5           with respect to that document -- those  
6           document requests.

7                       With that, we're going to just take a  
8           short recess so that I can come back and give  
9           my ruling on document request No. 35 of the  
10          seventh set of document requests and then  
11          we'll go into the informal motion practice and  
12          get the others on the phone. So we'll take a  
13          five-minute recess. Thank you.

14  
15                       (A break was had in the proceedings)

16  
17                       THE COURT: You can be seated.  
18          Sorry. Thank you. With respect to document  
19          request No. 35 of the seventh set of the  
20          document request, I'm going to -- just a  
21          moment, please.

22                       Hello, Magistrate Judge Mayeron.

23                       MR. GARDNER: Good afternoon  
24          again, Your Honor. This is Jim Gardner for  
25          Trans Union.



1 THE COURT: All right.

2 MR. MILNE: This is Robert  
3 Milne again for Experian.

4 THE COURT: Okay. I'm just  
5 going to have you sit in on the balance, the  
6 tail end of the motion to compel by  
7 defendants. I'm just issuing a ruling on one  
8 of the document requests and then we'll be  
9 going into the informal motions. So bear with  
10 us here.

11 With respect to document request  
12 No. 35, I am going to grant the defendants'  
13 motion in part and I'm going to do it to this  
14 extent. The plaintiffs will be ordered to  
15 produce the documents sought by those document  
16 requests. To the extent that the speaker of  
17 those two press releases, and I think the  
18 other two were year-end statements or  
19 quarterly statements, to the extent that the  
20 speakers had -- were relying on documents as  
21 they were making those statements, in other  
22 words had them in their presence while they  
23 were making those statements, those documents  
24 will be produced.

25 But to the -- I am denying the motion

1 to the extent it's asking the plaintiffs to go  
2 back and find all documents that could support  
3 those statements basically because -- for two  
4 reasons. One is it's just an incredibly  
5 burdensome request to do. And second, I weigh  
6 that burden against the nature of the  
7 plaintiff's responses. And while the  
8 plaintiffs do not outright admit these various  
9 document requests, I think that they are  
10 sufficiently admitted that defendants will be  
11 able to use their responses along with the  
12 fact that they also admitted they didn't  
13 retract those statements effectively at trial.  
14 So the burden is just too great, though, to  
15 ask the plaintiffs to go back and find  
16 sentence by sentence all of the documents that  
17 could have or did in fact support those  
18 statements. But to the extent that the  
19 speaker had documents in front of them that  
20 they were relying on to make those statements  
21 whether it be in a file or they were reading  
22 from them, have them in their presence, I  
23 don't want to say literally in their hand,  
24 Mr. Collyard, that I am going to order that  
25 those documents be produced. I think that

1       those speakers should know what they  
2       physically had in their possession as those  
3       statements were made and that can lessen the  
4       burden significantly for plaintiffs. So  
5       that's my ruling with respect to document  
6       request No. 35.

7               Now, as I understand it, then, with  
8       respect to the seventh set of document  
9       requests, plaintiffs have already complied  
10      with document -- the order on document request  
11      8, 11 and 30, that the letter has already been  
12      sent. For document request 35 I am ordering  
13      some relief and I'm also ordering relief on  
14      document request 1 through 3 of the ninth set  
15      of document requests.

16             When do plaintiffs believe they can get  
17      those documents to defendants?

18                     MR. COLLYARD: Your Honor, I  
19      would propose that it happen -- remember  
20      there's a searching process and processing is  
21      (unintelligible). With the holidays, I would  
22      propose sometime in middle of January.

23                     THE COURT: Well, I have Olson  
24      producing their documents on January 9 which  
25      is a little over a month from now. Would that

1 be acceptable, doable?

2 MR. COLLYARD: Yeah. Can we  
3 do it like this, Judge? We'll do it and if a  
4 problem arises --

5 THE COURT: Then bring it to  
6 my -- then have a meet and confer with  
7 defendants?

8 MR. COLLYARD: Yes.

9 THE COURT: And if you can't  
10 resolve it, then bring it immediately to my  
11 attention. But let's have those documents in  
12 hand by January 9.

13 All right. Anything further on the  
14 motion to compel by defendants before we go  
15 into an informal conference and I release the  
16 court reporter?

17 MR. PACE: Just for the  
18 record, Your Honor, with respect to the 8, 11  
19 and 30 that I believe the way Your Honor just  
20 put it, plaintiffs have complied with --

21 THE COURT: They represented  
22 that an e-mail has been sent to you with those  
23 Bates numbers.

24 MR. PACE: Just for the  
25 record, I think it came when we were in the

1 car on the way to the courthouse today and I  
2 notice that it came in but we haven't, of  
3 course, had a chance to review it, see if  
4 there are --

5 THE COURT: I'm ordering that  
6 the Bates numbers to those documents be  
7 produced to you. And those it seems to me can  
8 be done forthwith if they haven't.

9 MR. COLLYARD: They have been,  
10 Judge.

11 THE COURT: And the  
12 representation is that it's already been  
13 complied with.

14 MR. COLLYARD: If Mr. Pace  
15 wants to pull up his Blackberry and read it  
16 over the next five minutes, feel free --

17 THE COURT: I don't know. I  
18 would prefer he not do that right now. But in  
19 any event, you're ordered to do it and if it  
20 hasn't been complied with, then you need to  
21 immediately do so. With that, then, I can let  
22 the court reporter go.

23 Now, let me ask a question. We still  
24 have the ability to record this matter if the  
25 parties wish it and Mr. Cotras will remain

1       here. Is there desire to record the informal  
2       motion?

3                   UNKNOWN SPEAKER: Yes, there  
4       is, Your Honor.

5                   THE COURT: All right. Then  
6       let's address first the issue with respect to  
7       the deposition and then we'll address the  
8       issue about the privilege log.

9                   Mr. Schutz, why don't you tell me why  
10      the -- the picture defendants have painted is  
11      unilaterally you canceled depositions, you  
12      didn't bring a motion for protective order,  
13      and you had no right to do so.

14                  MR. SCHUTZ: That's correct,  
15      Your Honor, in terms of what they said.

16                  THE COURT: Right. I'm not  
17      saying you agree with it but that's what they  
18      said.

19                  MR. SCHUTZ: So here are the  
20      facts. Let me just paint the facts for you,  
21      Judge, and then we'll go from there. At I  
22      believe it was 5:00 last night, it was either  
23      TU or Experian, one of them came later, but  
24      the first notice we got was at  
25      5:00 electronically that a counterclaim had

1           been filed.

2                           THE COURT:   All right.   Now,  
3           let me back up.   You all filed an amended  
4           complaint.

5                           MR. SCHUTZ:   We filed an  
6           amended complaint and that process went  
7           through motion putting a draft forward.  
8           Everybody knew what the amended complaint was  
9           going to be.   And then there were also  
10          negotiations about their being able to file an  
11          amended counterclaim related to cancellation  
12          of a trademark.   And what it was basically was  
13          taking a defense that they had alleged and  
14          turning it into an affirmative counterclaim.  
15          Really didn't expand the scope of the case.  
16          There's been discovery on it, expert reports  
17          on cancellation of the counterclaim.   Nothing  
18          unusual there.

19                          THE COURT:   And I need to back  
20          up one more second.

21                          MR. SCHUTZ:   Sure.

22                          THE COURT:   Remind me what the  
23          amendment to the complaint was substantively.  
24          What did it add?

25                          MR. SCHUTZ:   Our substantive

1           amended -- what was our substantive amended  
2           complaint?

3                           UNKNOWN SPEAKER:   The best way  
4           to describe it was it made explicit that we  
5           have a --

6                           MR. SCHUTZ:   Oh, yes, that's  
7           right.   I'm sorry.

8                           UNKNOWN SPEAKER:   -- a per se  
9           antitrust claim.

10                          MR. SCHUTZ:   That's right.  
11           Okay.   That's correct.   We had a per se price  
12           fixing claim I believe is what it was.   And so  
13           but everybody knew that.   I mean, it was  
14           exchanged up front.   We had negotiations about  
15           that, including not a surprise to everybody we  
16           made the appropriate motion.   So last night  
17           what we expected to get was the final version  
18           of the draft trademark cancellation claim that  
19           had been exchanged by the parties and I think  
20           the Court may have in fact seen that or it was  
21           done pursuant to stipulation rather.   And what  
22           we get is that plus a 22 page, 78 paragraph  
23           section to monopolization claim against Fair  
24           Isaac.   No warning about that, nothing.   So  
25           that happens at 5:00.   We get together.   We



1       have a conference about wow, what does this  
2       mean? What do we do? We've got these  
3       depositions coming up and we're in the process  
4       of going -- and by the way, our client still  
5       has not seen this.

6               We asked for permission earlier today  
7       and perhaps even last night for our client to  
8       be able to see this because it was filed under  
9       seal and last night we did not get permission  
10      to do that nor today up until I asked Mr. Pace  
11      in the courtroom today and he said for  
12      Experian it would be okay if our client looked  
13      at this.

14               THE COURT: All right. Let me  
15      just stop you so I want to make sure I  
16      understand the lay of the land as you've  
17      presented it. You -- there's a discussion or  
18      plaintiff's approached defendants about  
19      amending their complaint to add a per se price  
20      fixing --

21               MR. SCHUTZ: Right.

22               THE COURT: -- antitrust  
23      claim.

24               MR. SCHUTZ: Right.

25               THE COURT: And as part of

1       those discussions, defendants -- and they're  
2       asking you to stipulate because the time to  
3       amend the complaint or amend the pleadings has  
4       long since passed --

5                   MR. SCHUTZ:   That's correct.

6                   THE COURT:   -- under the  
7       scheduling order.   And you have discussions  
8       with the defendants and they or as part of  
9       those discussions are looking to add a  
10      counterclaim with respect to trademark,  
11      correct?

12                  MR. SCHUTZ:   Cancellation of  
13      the mark, yes.

14                  THE COURT:   And the parties,  
15      because I didn't hear a motion, I know you  
16      ultimately agreed.   You submitted it to me by  
17      stipulation.

18                  MR. SCHUTZ:   Correct.

19                  THE COURT:   And what I  
20      remembered was that the parties agreed that  
21      the plaintiffs could file their amended  
22      complaint.

23                  MR. SCHUTZ:   Yes.

24                  THE COURT:   Now, are you  
25      saying that part of the stipulation which I

1 don't recall reading was that they also could  
2 file an amended counterclaim without bringing  
3 a motion to do so because the time had passed?

4 MR. SCHUTZ: Right. And that  
5 amended -- our understanding, clear  
6 understanding and the documents going back and  
7 forth support that that counterclaim was for  
8 cancellation of trademark.

9 THE COURT: Okay.

10 MR. SCHUTZ: Because, again,  
11 this is, you know --

12 THE COURT: So what you were  
13 expecting to come in with their answer was  
14 denying your new claim.

15 MR. SCHUTZ: Right.

16 THE COURT: Having to do with  
17 the per se price fixing and to add the  
18 trademark claim.

19 MR. SCHUTZ: Right. And the  
20 reason it wasn't a big deal for each party to  
21 stipulate to that at this late stage of the  
22 proceeding is they were tied up. I mean, the  
23 same operative set of facts that have been  
24 litigated throughout this case and on which  
25 discovery has been taken form the basis of

1       these additional claims, our per se claim and  
2       their cancellation claim because they had a  
3       cancellation affirmative defense and so it was  
4       all up there.

5                   THE COURT:   Okay.   And now  
6       you're saying all of a sudden you had a new  
7       claim comes in.

8                   MR. SCHUTZ:   Brand new claim  
9       comes in.   It's antitrust claim under Section  
10      2 against Fair Isaac.   It's a standalone claim  
11     and it comes in last night at 5:00.   And  
12     before I get to the discovery aspects in just  
13     a moment, I think it's helpful to step back  
14     and say, all right, what does that mean and  
15     what are the ramifications of this.   Setting  
16     aside the dispute that we've got here about  
17     expert discovery, what happens with this if  
18     this claim were not stricken and allowed to go  
19     forward.   Well, one way to look at it is what  
20     if they filed it as a new suit, just filed an  
21     antitrust suit against Fair Isaac.   That's  
22     something that probably would result in a year  
23     and a half to two year discovery schedule.   I  
24     mean, these Section 2 monopolization claims  
25     are very complicated.   Well, what does it mean

1       for this case? Certainly the whole schedule  
2       is blown up by filing -- if this claim is  
3       allowed to stay in this case and is not  
4       stricken. It's going to require separate  
5       damage experts. It's going to require new  
6       opinions on antitrust and economics and market  
7       share or all the acts. I mean, it goes on for  
8       70 paragraphs.

9               So keeping that as background, the  
10       first thing we do when we look at this we see  
11       paragraph No. 1, quote, Fair Isaac Corporation  
12       currently is and has been for many years a  
13       virtual monopolist in the credit scoring  
14       industry. So that's how they start out  
15       charging us with being a monopolist.  
16       Paragraph 2 starts out, while ostensibly  
17       directed to the recent launch of the  
18       VantageScore credit scoring services, this  
19       lawsuit is, in fact, the culmination of  
20       several years worth of efforts by Fair Isaac  
21       to fraudulently obtain through, the federal  
22       trademark registration process, exclusive  
23       rights and in numerical range 300 to 850 for  
24       the purpose of maintain its dominant position  
25       in the credit scoring industry, and it goes

1 on.

2 So it appears, what appears to us is  
3 happening is they filed this antitrust  
4 counterclaim without seeking permission,  
5 without -- past the April 1, 2000 deadline for  
6 filing an amended claim and it's 5:00 the  
7 night before they're to take the trademark  
8 expert in our case and it's clear that they  
9 are tying that in now to our monopolization  
10 claim because paragraph 1 calls us  
11 monopolists. Then they talk about how we used  
12 our 300, 850 score and the trademark  
13 registration process to cement our dominant  
14 position and it goes on and on, of course.

15 So we're being sandbagged. We're  
16 absolutely being sandbagged here. There's  
17 been no report by them on this. Our expert  
18 hasn't done anything with regard to how that  
19 might tie into cementing a dominant position.  
20 So we said wait a minute. There isn't going  
21 to be a deposition go forward until we're able  
22 to sort this out. They said well, we're going  
23 to get a hold of the court 9:00 tomorrow  
24 morning. We said fine, we'll bring it up  
25 then, at which point we fully intended to seek

1 a protective order. And for some reason the  
2 call didn't take place. As I understand now,  
3 Your Honor was not available but we made it  
4 clear, you know, get us in on the call, we'll  
5 gladly talk to the Court about this and go  
6 through the process of seeking a protective  
7 order. And the first thing I said when I  
8 walked in here today, of course, was two  
9 things we wanted to bring up in addition to  
10 the discovery motions, strike this complaint  
11 and protective order on the deposition.

12 So that's the setup, Judge, and that's  
13 why we did what we did.

14 THE COURT: Okay.

15 MR. SCHUTZ: I suppose, all  
16 else being equal, we could have had somebody  
17 stay up until 3:00 in the morning trying to  
18 get a piece of paper on file but I think  
19 that's unreasonable given that we've really  
20 been sandbagged here.

21 THE COURT: All right. Who  
22 wants to speak to this issue on behalf of  
23 defense?

24 MR. PACE: Your Honor, if I  
25 could briefly and then Mr. Gardner or

1 Mr. Milne --

2 THE COURT: All right. Let me  
3 ask a question as you're coming up here. So  
4 the picture that Mr. Schutz has painted is you  
5 have filed an unauthorized counterclaim,  
6 meaning the deadline to amend the pleadings to  
7 add claims or parties was April 1, 2007 and so  
8 the time has passed to add one without a  
9 motion to this Court and establishing good  
10 cause to bringing the motion at this time. So  
11 before I address, then, the fact that they  
12 didn't bring a motion for protective order,  
13 what basis, given apparently there was,  
14 according to them and you'll correct them if  
15 they're wrong, no agreement to add this  
16 counterclaim, there was only an agreement to  
17 add this trademark counterclaim.

18 MR. PACE: I will correct them  
19 because they are wrong about this. But we  
20 believe the counterclaim is proper, that we  
21 have a right to file it in response to their  
22 new complaint and that in any event, it's  
23 beside the point at the moment if they want to  
24 file a motion to strike, they certainly can  
25 but it has nothing to do with the depositions



1       going on. Mr. Schutz went through and  
2       cited -- read from the first couple paragraphs  
3       of our antitrust counterclaim. It has nothing  
4       to do with the trademark claims. We make no  
5       mention at all of -- the only trade -- the  
6       only counterclaim that talks about their fraud  
7       on the patent office in obtaining the 300, 850  
8       scoring range --

9                   THE COURT: The patent office  
10       or trademark office?

11                   MR. PACE: The patent and  
12       trademark office, PTO. Sorry, Your Honor.

13                   THE COURT: Okay.

14                   MR. PACE: Is the claim that  
15       they've not only seen for months but they've  
16       also submitted an expert report on. So that  
17       one they've known about forever.

18                   The history, Your Honor, just so we're  
19       clear, is several months ago, as Mr. Schutz  
20       mentioned or may have -- or actually, as Your  
21       Honor mentioned, the defendants, when it was  
22       revealed in discovery that the -- that the  
23       plaintiffs had obtained their registration for  
24       the numeric scoring range, 300, 850, we  
25       thought, based on a fraud on the PTO, we file

1 a motion for a leave to amend our complaint to  
2 assert the trademark counterclaim. That was  
3 step one. That's what came first. This was  
4 before any word of any new complaint by them.  
5 That came first. Then after that the  
6 plaintiffs proposed to us that oh, by the way,  
7 we're filing an amended complaint anyway. And  
8 in an e-mail that we got from the plaintiffs  
9 on August 28, after our motion was filed and  
10 they -- and this was in the context of their  
11 draft new antitrust count, the first count  
12 that the plaintiffs were talking about that  
13 they sent us, and we were talking about what  
14 do we do with our existing motion for leave,  
15 they said we'd like to know whether your  
16 clients will consent to this amendment, their  
17 amendment to their complaint or whether a  
18 motion will be necessary. An amendment to  
19 their complaint would eliminate the need for  
20 your clients to go forward with their motion  
21 to amend the pleadings given that you could  
22 too so as a matter of right in response to  
23 Fair Isaac's pleading. Please let me know the  
24 position of your clients.

25 So then what happened next was -- and

1 while all of this is going on, as Your Honor  
2 knows, the discovery of the Equifax settlement  
3 which only happened over the summer,  
4 continued. And as Your Honor also knows,  
5 that's not even resolved yet. You know we  
6 still have a privilege log. And that's the  
7 next item for Your Honor coming on some of the  
8 documents relating to the Equifax settlement.  
9 We think, they may not agree, but we think  
10 it's a obviously a key issue that changes the  
11 case. And so that discovery is going on while  
12 all this is happening up until this week and  
13 including this week, Your Honor.

14 And so while all this is going on, we  
15 then, as a result of the plaintiff's proposal,  
16 we enter into a stipulation. And Your Honor  
17 signs an order that speaks generally about the  
18 deadline for amended complaints and answers  
19 and it provides a deadline for within three  
20 business days of -- this is Your Honor's order  
21 on November 6. Within three business days of  
22 the order, the plaintiffs are to file their  
23 third amended complaint.

24 Then, number two, the defendants must  
25 answer or otherwise plead in response to the

1       plaintiffs third amended complaint within 20  
2       days of service of the complaint. There were  
3       no restrictions on what we could say in  
4       response to their complaint. Perhaps  
5       following the e-mail we got from the  
6       plaintiffs on August 28 it was an answer and  
7       counterclaims made as a right.

8               And then number three, the plaintiffs  
9       must file any answer or other pleading in  
10      response to the defendants' responsive  
11      pleading within 20 days. In other words, it  
12      was obviously specifically contemplated that  
13      they might be responding to whatever  
14      counterclaims we filed.

15             Now, we added -- it's true. I assume  
16      they didn't know about our antitrust  
17      counterclaim until we filed it. This is a new  
18      issue, Your Honor. This is the -- the Equifax  
19      settlement is something that just happened a  
20      couple months ago and as to which we've gotten  
21      some discovery but we're still seeking  
22      discovery. And the primary basis for our  
23      antitrust counterclaim is the Equifax  
24      settlement. I have a copy -- I think Your  
25      Honor got a courtesy copy yesterday of ours

1       for Experian but we can go through it. I  
2       mean, the primary basis for that counterclaim,  
3       there's lots of other facts in there but a  
4       primary basis is the Equifax settlement. And  
5       so that's the reason why it was filed  
6       yesterday. Yesterday being our next  
7       opportunity to file an answer and any  
8       counterclaims.

9               But I guess I just return to the point  
10       of what does the antitrust counterclaim have  
11       to do with the depositions that were going on  
12       today and tomorrow and what happens next. Are  
13       the plaintiffs simply able to, because of the  
14       existence of a counterclaim, that if they want  
15       to move to strike they may? Do they have the  
16       ability to just unilaterally halt all  
17       proceedings in the lawsuit and say okay, we're  
18       just going to do nothing until we resolve this  
19       issue about your counterclaim?

20              We think obviously -- we respectfully  
21       suggest that they don't have the ability to do  
22       that. We were on a schedule. Your Honor set  
23       a schedule that had a very tight expert  
24       deposition schedule over the next few weeks.  
25       We worked very hard to schedule 11 depositions

1 over the course of three weeks. We all made  
2 travel plans. We all booked experts, court  
3 reporters, et cetera, and on the day before  
4 the very first deposition, the whole thing  
5 gets called off. And that's why we wanted to  
6 bring it to Your Honor's attention today.

7 I don't know if Mr. Gardner or  
8 Mr. Milne has anything to add --

9 THE COURT: Let me ask. You  
10 understand there's a deposition tomorrow  
11 somewhere? Is that right? On Saturday?

12 MR. PACE: Correct. In  
13 Minneapolis.

14 THE COURT: All right. And  
15 that's of an expert or what?

16 MR. PACE: An expert  
17 designated by the plaintiffs, Younger, Michael  
18 Younger.

19 THE COURT: All right. And  
20 then what's happening next week?

21 MR. PACE: Next week there are  
22 several depositions. There's a deposition of  
23 Roger Knoll, the plaintiff's economist, the  
24 Meyer deposition, plaintiff's damages expert.  
25 Phil Johnson, one of the defendants' trademark

1 experts and survey experts and Kevin Murphy,  
2 the defendants' economist. Did I miss one  
3 next week?

4 THE COURT: And are you saying  
5 that none of these depositions, either theirs  
6 or yours, would be affected by this  
7 counterclaim, your antitrust counterclaim?

8 MR. MILNE: Your Honor, if I  
9 might. This is Robert Milne for Experian. To  
10 answer your question, I mean, all of these  
11 expert depositions relate to the long pending  
12 claims asserted by Fair Isaac. They -- that  
13 is the subject matter of these depositions.  
14 There are expert reports that have gone in,  
15 rebuttal reports have gone in and they all  
16 pertain to those existing claims.

17 And I wanted, if I might also to just  
18 comment on one other thing that Mr. Schutz was  
19 describing. He made it sound as though this  
20 new antitrust counterclaim was a brand new  
21 thing that if we started this case from all  
22 over, they'd get two years of discovery in,  
23 that we'd have to kind of start all over here  
24 because of this.

25 Now, as Mr. Pace mentioned, the

1       gravamen of that antitrust claim is what we  
2       think is the anticompetitive agreement that  
3       Fair Isaac entered into with Equifax. The  
4       background to it, the relevant market, all of  
5       that sort of material is material which is --  
6       it has been developed in the discovery process  
7       that has occurred in the existing matter. So,  
8       you know, we are not embarking on some  
9       completely new tangent, but there is a new  
10      development and recent development, that is  
11      this agreement, that we think brings --  
12      crosses the line and warrants this claim.

13                   THE COURT: All right. Here  
14      is what I'm going to do on this issue. I  
15      am -- we need to tee up this issue about the  
16      propriety of the counterclaim, whether it's  
17      teed up as a motion to strike it or a motion  
18      to amend to add it. Obviously, defendants  
19      think they had no obligation to bring a  
20      motion. I suspect plaintiffs will disagree or  
21      may disagree about that. In any event, you've  
22      indicated, Mr. Schutz, that you're going to  
23      bring a motion to strike.

24                   That said, this case is going to  
25      proceed as it is currently postured, meaning



1       that until a decision is made on that  
2       counterclaim, I'm not going to hold up any  
3       discovery on this case, expert discovery or  
4       otherwise. If that counterclaim remains in  
5       the case, then I will cross that bridge at  
6       that time as to what impact that has on the  
7       case and whether parties should be able to  
8       seek costs or reimbursement on one side or the  
9       other for having been put through the exercise  
10      if the counterclaim is in or if it's not in.

11             But to be honest, given the lateness of  
12      bringing that counterclaim, however it came to  
13      pass, has the potential of having an enormous  
14      impact on this case and certainly one that  
15      needs to be fleshed out by the parties, but I  
16      don't want to stop this case right now from  
17      proceeding as it is currently postured,  
18      meaning the day before that antitrust  
19      counterclaim was made.

20             So I want those depositions to go  
21      forward tomorrow and the ones that are  
22      scheduled next week. I also want to get this  
23      issue teed up on an expedited basis if it's  
24      going to be framed as a motion to strike the  
25      counterclaim or if defendants do decide

1       that -- whatever they want, however they want  
2       to posture it, but I want to tee up this issue  
3       as to whether that claim is going to be in or  
4       out of the case on an expedited basis. So  
5       that means getting briefs and responses to me  
6       on a very quick turnaround. We just can't let  
7       that one languish while you all are continuing  
8       to do this expert discovery which is  
9       unfortunate because this always happens right  
10      at the holiday time.

11               So I guess I'm going to say to  
12      plaintiffs who have said they're going to be  
13      bringing a motion to strike how soon can you  
14      get that motion teed up to me and then we're  
15      going to need a quick response by defendants?  
16      Can you get it teed up by Wednesday?

17                   MR. SCHUTZ: I'm sorry, Your  
18      Honor?

19                   THE COURT: By this coming  
20      Wednesday which would be -- well,  
21      Steve stepped out. There you are.

22                   MR. SCHUTZ: Your Honor, one  
23      of the problems that we have is we have depositions  
24      and prep and we have a lot of key people that  
25      are --

1 THE COURT: I understand.

2 MR. SCHUTZ: I mean, if we  
3 could have until Friday to get  
4 (unintelligible) that's a week from today.

5 THE COURT: Which would mean  
6 the 12th.

7 MR. SCHUTZ: Yeah. We've got  
8 people in the throws of appearing for these  
9 depositions.

10 THE COURT: All right. And if  
11 I were to do that and defendants respond by  
12 the 19th, that will give you a week. If you  
13 decide to bring your own motion for whatever  
14 motion you might want to bring that has to do  
15 with this issue, it will be due on the 12th as  
16 well. Otherwise, your response to their  
17 motion to strike would be on the 19th. And  
18 then we will -- I'll have to check my calendar  
19 and we'll get a date out tomorrow as to when  
20 the hearing will be but it will be that next  
21 week somewhere between Monday through  
22 Wednesday. So one of those days. And if you  
23 want to appear by phone, that's fine. If you  
24 want to come in, that's fine as well but we  
25 need to address that issue.

1           But in the meantime, we're not going to  
2           stop these depositions from going forward.  
3           And I will have to deal with what relief is  
4           appropriate after I decide the motion to  
5           strike.

6                       MR. SCHUTZ: One concern from  
7           the trenches, Judge, as we go into these  
8           depositions, I mean, one of the concerns we've  
9           got, notwithstanding, you know, the comments  
10          by Mr. Milne, we were sandbagged with this.  
11          We think that the defendants are going to try  
12          to use these expert depositions to support  
13          this counterclaim in which case we think  
14          that's where they're going. We may be back to  
15          the court in the middle of these depositions  
16          seeking a protective order for them going  
17          outside the allowed claims at this point and  
18          trying to actually use the expert depositions  
19          as a subterfuge to gain further support for  
20          their counterclaim. That's our big concern  
21          here, Judge.

22                      THE COURT: I guess we're  
23          going to have to cross that bridge. You know,  
24          you're always free to call me during a  
25          deposition. You're always free to make a

1 record of what your objection is. I would  
2 expect that the depositions at this point are  
3 going to be confined to the amended complaint  
4 as agreed to by the parties which was to add  
5 your price fixing claim and the trademark  
6 counterclaim. That's going to be the four  
7 corners of what's going to be explored.  
8 Obviously the expert reports that go with all  
9 those claims and defenses. Clearly it  
10 wouldn't surprise me if some of what they do  
11 may, at the same time, in light of what  
12 Mr. Milne said, also support a new suit or  
13 a -- their antitrust counterclaim. It may  
14 serve a dual purpose. As long as it serves a  
15 dual purpose -- as long as it serves the  
16 purpose of the amended complaint and the  
17 amended counterclaim with the trademark  
18 that -- you're going to be within your rights  
19 to explore those areas. If it looks like it's  
20 going well outside it, I expect the parties  
21 will raise that issue.

22 MR. MILNE: And, Your Honor,  
23 may I raise one question, just point of  
24 clarification because I could imagine that  
25 might come up next week?

1 THE COURT: Very quickly,  
2 Mr. Milne. I have to leave here in 17 minutes  
3 and so --

4 MR. MILNE: This will be very,  
5 very short.

6 THE COURT: And we have to  
7 address the privilege log issue.

8 MR. MILNE: We certainly  
9 expect, as part of the expert depositions next  
10 week, that the subject of the Equifax  
11 agreement will come up because we think it  
12 goes directly to issues in the existing case  
13 concerning the long-term viability of Fair  
14 Isaac in the marketplace and which goes  
15 directly to the claims that Fair Isaac has  
16 made against the defendants. And so we  
17 certainly do intend to get into issues around  
18 the Equifax -- the experts' analysis of that  
19 agreement and I wouldn't -- pursuant to what  
20 you just said, you know, I think it clearly  
21 goes to the issues in the case and just wanted  
22 to put that out as a point of clarification.

23 THE COURT: Well, I'm not  
24 going to give you an advisory opinion on  
25 whether that's covered or not. I certainly

1 know that the Equifax agreement with  
2 plaintiffs is an issue in this case. How it  
3 fits with the claim before this antitrust  
4 counterclaim was served last night I can't  
5 opine on that at this point but your point is  
6 taken and I think we're just going to have to  
7 see how these depositions go. Your experts  
8 have issued reports and presumably that's what  
9 you're going to be questioning them about.  
10 But I don't want to -- I can't give guidance  
11 at this point on it other than to say I'm  
12 going to be looking at the deposition to be  
13 taken as the way this case looked before that  
14 antitrust counterclaim was served.

15 MR. SCHUTZ: And that's the  
16 way we would expect it to be taken, Judge.  
17 But based on Mr. Milne's statement, they're  
18 going right to the antitrust counterclaim they  
19 filed against Fair Isaac.

20 MR. MILNE: That is -- Your  
21 Honor, that is certainly not the intent and we  
22 will be focusing on the issues in the case.

23 THE COURT: All right. Okay.  
24 Well, we need -- as I said, we're not going to  
25 stop the discovery and we need to get the

1       issue teed up quickly. So I will -- actually  
2       not tomorrow. Tomorrow is Saturday. On  
3       Monday we'll send out a date for the hearing  
4       time and date for the hearing. It will be  
5       that Monday through Wednesday before  
6       Christmas.

7               All right. Let's address, then, the  
8       issue of the privilege log. You all were  
9       going to confer about how to read what the  
10      obligations of the parties were. Did you come  
11      to any resolution on this?

12              MR. PACE: We did, Your Honor.

13              THE COURT: All right.

14              MR. PACE: And just very  
15      quickly. The one issue is with -- the one  
16      final issue on the counterclaim is I guess we  
17      still have a question about what happens with  
18      the deposition that got canceled today.

19              THE COURT: It's going to have  
20      to get rescheduled.

21              MR. PACE: Okay.

22              THE COURT: Obviously it's --

23              MR. SCHUTZ: We'll work with  
24      them, Judge.

25              THE COURT: You're going to



1       have to work with them to get this  
2       rescheduled, and if there were -- if there are  
3       issues with that or there are costs that were  
4       incurred as a result of that cancellation that  
5       you feel defendants shouldn't have to bear,  
6       you can take it up with me but understand now  
7       I have a better understanding of that it took  
8       two to tango as usual that created the issue  
9       here before me. But in any event, it needs to  
10      be scheduled.

11                   MR. SCHUTZ: Yes.

12                   MR. PACE: Okay. With respect  
13      to the privilege logs, we did reach an  
14      agreement, Your Honor. We both went back to  
15      our clients and looked at the documents that  
16      would be affected and agreed, and Mr. Tietjen  
17      certainly should correct me if I get any of  
18      this wrong, that we -- the parties would  
19      continue to act as they have been acting in  
20      interpreting the Court's -- the provision in  
21      the scheduling order with respect to a  
22      privilege log cutoff. In other words, with  
23      the exception of two categories I'm about to  
24      identify, the parties would continue to treat  
25      the language in the Court's order that said

1 the parties shall not be required to log work  
2 product materials or attorney-client  
3 privileged communications relating to the  
4 claims and defenses in this lawsuit. After a  
5 certain date, the parties would treat that  
6 language as just a general cutoff for both  
7 sides for privilege logs based on the  
8 respective cutoff dates, June '06 for the  
9 plaintiffs, October '06 for the defendants.

10 However, as a compromise, both sides  
11 agreed to identify a category of issues that  
12 the parties believed were kind of more current  
13 issues that for -- that weren't litigation  
14 type documents, weren't pleadings, client  
15 updates, et cetera, but that were the types of  
16 documents that were more substantive on  
17 current issues for which a privilege log might  
18 be helpful.

19 And we have a stipulation that we're  
20 going to just review one last time and sign  
21 and submit to Your Honor that identifies the  
22 two sets of requests of the defendants. It's  
23 the tenth set of requests that plaintiffs will  
24 identify -- will log documents responsive to  
25 those and -- for the plaintiffs they've

1 identified and for the defendants we will log  
2 documents responsive to the request 1 through  
3 8 of their eighth set of requests to Experian  
4 and Trans Union or to VantageScore. That's  
5 the sixth set of requests.

6 So we've come up with a compromise that  
7 identifies more recent issues that we will  
8 log. Otherwise, we will continue to act as we  
9 will. The stipulation that we'll submit will  
10 include the language in Your Honor's scheduled  
11 order and the way that we think it could be  
12 revised slightly to allow for this probability  
13 and make it consistent with practice.

14 THE COURT: All right.  
15 Mr. Tietjen, does that accurately reflect your  
16 agreement?

17 MR. TIETJEN: Well, it was  
18 nice of Mr. Pace to state it more  
19 (unintelligible) than it actually was. They  
20 said you give us a log on that tenth set but  
21 we're going to make you log everything and if  
22 you want something in return, you can have it.  
23 So we said okay, we'll give you a little  
24 longer on the tenth set if it means so much to  
25 you and we'll ask for a log, then, on all

1       communications regarding your shredding of  
2       documents and that's --

3               THE COURT:   Okay.   And so the  
4       point is you reached an agreement.

5               MR. TIETJEN:   That's right.

6               THE COURT:   All right.   And I  
7       assume that that stipulation will come to me  
8       next week, then, for modification of the  
9       scheduling order.

10              MR. PACE:   Yes, Your Honor.

11              THE COURT:   And so just so I'm  
12       clear, then, what the parties are agreeing is  
13       if a document was generated that's either work  
14       product or attorney client after those cutoff  
15       dates, you don't have to log it anymore unless  
16       they fall into these two groups.   All right.  
17       So it sounds like there's several places in  
18       the scheduling order that it needs to be  
19       cleaned up I would suggest as you look through  
20       it.

21              All right.   Then unless the parties  
22       have anything further, that concludes our  
23       informal conference as well.   I don't see  
24       anybody has anything further.   Anything  
25       further on the phone?

1 UNKNOWN SPEAKER: No. But  
2 just thank you, Your Honor, for facilitating  
3 our ability to participate on the phone given  
4 the fact that we didn't realize a lot of this  
5 was going to come up today.

6 THE COURT: Sure. Not a  
7 problem. Thank you very much everyone. Have  
8 a good weekend and a good holiday.

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1 STATE OF MINNESOTA )  
 ) ss.  
2 COUNTY OF WASHINGTON)

3  
4 BE IT KNOWN, that I transcribed the  
5 electronic recording relative to the matter  
6 contained herein;

7  
8  
9 That the proceedings were recorded  
10 electronically and stenographically transcribed  
11 into typewriting, that the transcript is a true  
12 record of the proceedings, to the best of my  
13 ability;

14  
15  
16 That I am not related to any of the  
17 parties hereto nor interested in the outcome of  
18 the action;

19  
20  
21 IN EVIDENCE HEREOF, WITNESS MY HAND.

22  
23 s:/ Lisa M.Thorsgaard

24  
25